APPENDIX

APPENDIX A-1

(Filed March 9, 1982)

SUPREME COURT OF MISSOURI
EN BANC

No. 63324

STATE OF MISSOURI,
Respondent,

vs.

ANTHONY J. KANE,
Appellant.

ON TRANSFER FROM THE COURT OF APPEALS

Appellant-defendant appealed to the Missouri Court of Appeals, Western District, from a conviction by jury of robbery in the second degree and armed criminal action. The jury assessed punishment at seven years on the robbery and thirty-five years on the armed criminal action.

The court of appeals affirmed the robbery conviction under Count I and reversed the armed criminal action conviction under Count II.

Because of the general reluctance of courts to reverse the longer sentence and for reason that the Court of Appeals believed this Court had never clearly enunciated its rationale for reversing the armed criminal action conviction as opposed to the underlying felony either in or following our original opinion in Sours v. State, (Sours I), 593 S.W.2d 208, (Mo. banc 1980), and, because of the gen-

eral interest in this matter, the court of appeals, after opinion, transferred the case to this Court. Rule 83.02.

While this Court has made no effort to statistically document the length of sentences imposed by juries in *Sours*-type cases, our general observation has been that something in excess of ninety-five percent of the cases the much longer sentence has been assessed on the "underlying felony" (robbery) and the shorter sentence on the armed criminal action. We interpret this to mean that juries believed that they were enhancing the longer sentence for the basic underlying crime by the assessment of the penalty on the armed criminal action charge.

In *Sours I*, we briefly alluded to the fact that in the armed criminal action section, then § 559.225, RSMo Supp. 1976, "Each subsection contains the sentence: 'The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon.'" 593 S.W.2d 208, 222-23. We then reversed the conviction for armed criminal action. Clearly the quoted language in its usual and customary meaning was the language of enhancement, even though the 1976 reenactment of the statute had converted the statute from an enhancement statute to a statute constituting a separate crime. Laws of Mo. 1976, p. 780 (C.C.S.H.B. 1231, 997, 1024, 1116, 1332, & 1346).

It may be helpful to review the pre-*Sours* history of the armed criminal action statute. It was first passed in 1927:

> [S.B. 214.]
>
> CRIMES AND PUNISHMENT: Providing Penalty for Commission of Felony While Armed and Increasing Penalty for Each Subsequent Felony Committed.

AN ACT to provide a penalty for the commission of a felony while armed with a pistol or any deadly weapon or instrument and to provide an increased penalty for each subsequent felony committed while so armed and providing for the repeal of all acts and parts of acts inconsistent with this act.

SECTION

1. Providing for increased penalty for committing felony while armed with pistol or deadly weapon.

SECTION

2. Repealing inconsistent acts.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section 1. Providing for increased penalty for committing felony while armed with pistol or deadly weapon.—If any person shall be convicted of committing a felony, or attempting to commit a felony, while armed with a pistol or any deadly weapon the punishment elsewhere prescribed for said offense in the statutes and laws of the state of Missouri for the felony of which he is convicted shall be increased by the trial judge by imprisonment in the state penitentiary for two years. Upon a second conviction for a felony so committed such period of imprisonment shall be increased by fifteen years. Upon a fourth or subsequent conviction for a felony so committed the person so convicted shall be imprisoned for life.

Sec. 2. Repealing inconsistent acts.—All acts and parts of acts inconsistent with this act are hereby repealed.

Approved April 6, 1927.

Laws of Mo. 1927, p. 173.

The statute so remained on our books as an enhancement statute from that time until 1976, at which time it was by legislative reenactment converted into a statute constituting a separate and distinct crime:

[C.C.S.H.B. 1231, 997, 1024, 1116, 1332 and 1346]

CRIMES AND PUNISHMENT: Commission of certain crimes with certain weapons.

AN ACT to repeal section 556.140, RSMo 1969, relating to the commission of certain crimes with certain weapons, and to enact in lieu thereof one new section relating to the same subject, with penalty provisions.

SECTION	SECTION
A. Enacting clause.	1. Armed criminal action —penalty—exceptions.

Be it enacted by the General Assembly of the State of Missouri, as follows:

Section A. Enacting clause.—Section 556.140, RSMo 1969 is repealed and one new section enacted in lieu thereof, to be known as section 1, to read as follows:

Section 1. Armed criminal action—penalty-exceptions.—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punish-

ment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo.

Approved June 24, 1976.

Laws of Mo. 1976, p. 780, now § 571.015, RSMo 1978.

In order that we may more clearly understand the enhancement aspects of our own armed criminal action (felony firearm) statute, it may be helpful to examine the history of similar statutes from all of the states.

At least twenty states have enacted enhanced punishment statutes. Some require that so many years be added to a sentence for the felony or that so many years of the sentence must be served prior to parole or probation. In addition to Missouri, at least twelve other states have statutes declaring the use of a firearm during a felony to be a separate offense requiring imposition of a separate punishment.

The validity of enhancement statutes is clear. As stated in State v. Foster, 91 Wash.2d 466, 589 P.2d 789, 797 (1979), "We are aware of no authority which supports appellant's claim of double jeopardy for this type of enhanced penalty scheme." Quoted also in State v. Davison, 614 P.2d 489, 498 (Mont. 1980). *See also* State v. Reese, 625 S.W.2d 130 (Mo. banc 1981). Other claims challenging the validity of this type of statute have also been rejected. State v. Warner, 52 Or.App. 987, 630 P.2d 385 (1981); People v. Childs, 610 P.2d 101 (Colo. 1980); State v. Holmes, 276 N.W.2d 823 (Iowa 1979); State v. Frye, 390 A.2d 520 (Me. 1978); State v. Gabaldon, 92 N.M. 230, 585 P.2d 1352 (N.M.App. 1978); State v. Freeman, 233 Kan. 362, 574 P.2d 950 (1978); People v. Bush, 123 Cal.Rptr. 576, 50 Cal.App.3rd 168 (1975); Woofter v. O'Donnell, 91 Nev. 756, 542 P.2d 1396 (1975). In December of 1981, our own Court unanimously recognized the validity of enhancement statutes in a case dealing with our dangerous offender statute saying, "It is an enhancement statute and does not violate the constitutional guarantee against multiple punishment." State v. Reese, 625 S.W.2d 130 (Mo. banc 1981).

One court has limited the application of the enhancement statutes to those felonies in which the use of a firearm is not an element of the crime. State v. Workman, 90 Wash.2d 443, 584 P.2d 382 (1978). However, the rationale for this decision was that the legislature did not intend for the enhancement statute to apply in such a case. In fact several statutes in other states specifically state that the enhancement statute does not apply where the use of a firearm is an essential element of the offense for which the defendant is convicted. Sections 12022 *et seq.* Cal. Penal Code (West Supp. 1968); tit. 17-A, § 1252 Me. Rev. Stat. Ann. (West 1981); chap. 265, § 18 B Mass. Ann. Laws (LCP 1980); § 193.165 Nev. Rev. Stat. (1968); § 939.63(1)(6); Wis. Stat. Ann. West Supp. 1981-82); § 6-11-116 Wyo. Stat. (Michie 1981 Supp.). Only § 43-2336.1 Ark. Stat. Ann. (Bobbs-Merrill Supp. 1981), specifically states the enhanced penalty is to be applied even if the felony includes as an element the use of a firearm.

From the foregoing it appears that enhancement statutes have uniformly been upheld. Statutes that are particularly well drafted include § 939.63 Wis. Stat. Ann.;[1]

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1. 939.63 Penalties; use of a dangerous weapon

(1)(a) If a person commits a crime while possessing, using or threatening to use a dangerous weapon, the maximum term of imprisonment prescribed by law for that crime may be increased as follows:

1. The maximum term of imprisonment for a Class A, B or C misdemeanor may be increased by not more than 6 months.

2. The maximum term of imprisonment for a Class A, B or C felony may be increased by not more than 5 years.

3. The maximum term of imprisonment for a Class D felony may be increased by not more than 4 years.

4. The maximum term of imprisonment for a Class E felony may be increased by not more than 3 years.

(b) The increased penalty provided in this subsection does not apply if possessing, using or threatening to use a

(Continued on following page)

§ 6-11-116 Wy. Stat. Ann.;[2] §§ 43-2336 and 43-2336.1 Ark. Stat. Ann.; § 31-18-16 N.M. Stat. Ann. *See also* the statutes set out in Woofter v. O'Donnell, *supra*.

Double jeopardy principles have been more thoroughly discussed and analyzed in those cases involving double convictions and sentences under both a firearm use statute and a statute defining the underlying felony. The resolution of the issue of whether double jeopardy prohibits these multiple convictions and sentences has not been uniform. In State v. Hudson, 562 S.W.2d 416 (Tenn. 1978), the court held the statute defining the use of a firearm during the commission of a felony as a separate crime was merely an enhancement statute notwithstanding the specific lan-

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Footnote continued—

dangerous weapon is an essential element of the crime charged.

(2) Whoever is convicted of committing a felony while possessing, using or threatening to use a dangerous weapon shall be sentenced to a minimum term of years in prison, unless the sentencing court otherwise provides. The minimum term for the first application of this subsection is 3 years. The minimum term for any subsequent application of this subsection is 5 years. If the court places the person on probation or imposes a sentence less than the presumptive minimum sentence, it shall place its reasons for so doing on the record.

Source:

L.1979, c. 114 § 1, eff. March 1, 1980

Wis. Stat. Ann. § 939.63 (West Supp. 1981).

2. § 6–11–116. Possession of firearm while committing felony; penalty; applicability.

(a) A person who has in his possession a firearm while committing a felony shall be imprisoned for not more than ten (10) years in addition to the punishment for the felony. For a second or subsequent conviction under this section a a person shall be imprisoned for not more than twenty (20) years in addition to the punishment for the felony.

(b) Subsection (a) of this section does not apply to those felonies which include as an element of the crime the use or possession of a dangerous weapon. (Laws 1979, ch. 158, § 1.) Effective dates.—Section 3, ch. 158, Laws 1979, makes the act effective on May 25, 1979.

guage of the statute. *See also* State v. Buffa, 65 N.J. Super. 421, 168 A.2d 49 (1961). Some states concluded such double convictions and sentences were not permitted. Hunter v. State, 430 A.2d 476 (Del. 1981); Monroe v. State, 396 So.2d 241 (Fla.App. 1981); State v. Boudreau, 322 A.2d 626 (R.I. 1974); Whitton v. State, 479 P.2d 302 (Alaska 1970). Others held the statutes inapplicable where the predicate felony included as an element the use of a firearm. People v. Haron, 85 Ill.2d 261, 52 Ill. Dec. 625, 422 N.E.2d 627 (1981) (so holding on the basis of legislative intent); Grace v. Harris, 485 P.2d 757 (Ok. Crim. App. 1971), *overruled on other grounds* in State v. Edens, 565 P.2d 51 (Ok. Crim. App. 1977) (deciding the issue on double jeopardy grounds). Other courts upheld such multiple convictions. Wayne County Prosecutor v. Recorder's Court Judge, 406 Mich. 374, 280 N.W.2d 793 (1979). These disparate results are in marked contrast to the earlier cases illustrating the almost universal approval of enhanced punishment statutes.

The balance of the history of our armed criminal action statute appears in Sours v. State, (Sours I), 593 S.W.2d 208 (Mo. banc 1980), *vacated*, 446 U.S. 962, 100 S.Ct. 2935, 64 L.Ed.2d 820 (1980); Sours v. State, (Sours II), *on remand*, 603 S.W.2d 592 (Mo. banc 1980), *cert. denied, sub nom*, Missouri v. Sours, 449 U.S. 1131, 101 S.Ct. 953, 67 L.Ed.2d 118 (1981); and, State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981), in which we examined our *Sours* holdings in light of Albernaz v. United States, 450 U.S. 333, 101 S.Ct. 1137, 67 L.Ed.2d 275 (1981), *application for certiorari pending.*[3]

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3. We also note in passing that the 81st General Assembly, Second Regular Session, now has before it a bill attempting to revise the present armed criminal action statute. H.B. 1228, 81st General Assembly, Second Regular Session.

It is clear from the foregoing that had our armed criminal action statute remained in its original form as an "enhancement statute," we would not have been required to meet the double conviction issue raised and dealt with in *Sours*. When confronted in *Sours I* with the double conviction on a single set of facts, we reversed the armed criminal action sentence which was the shorter of the two sentences and which appeared to have been intended by the jury to be an enhancement of the penalty assessed on the underlying felony of robbery.

It is our conclusion that in order to establish uniformity of sentencing in *Sours* type cases, the armed criminal action sentence should be reversed in all instances. We recognize and respect the apparent logic of the lesser included offense analysis discussed by the court of appeals in its opinion, but we are convinced that in the historical background of the armed criminal action statute, the net effect of such statute is to enhance (in pure sense of enlarging) the penalty assessed for the underlying felony, whether the statute be phrased in terms of "enhancement" or "separate and distinct offense". The attempt to enhance or enlarge having failed because of being phrased in terms of separate crime or offense and in our opinion thereby violative of the constitutional prohibition against double jeopardy, we are left with only the penalty assessed on the underlying felony. Regrettable as it may be that this ruling may result in the striking of the greater penalty in this and a very few other cases, the application of this rule to all cases will assure that in the great majority of cases the defendant will be required to serve the longer sentence assessed and the law will be uniformly applied as to all defendants by the appellate courts of the state.

The court of appeals reached the correct result when they reversed the armed criminal action. The original

opinion of the court of appeals is approved subject to this opinion. A copy of the original court of appeals opinion is attached hereto and is ordered published as the opinion of the court of appeals to be followed in the reporter by this opinion on transfer from the court of appeals. The final judgment on appeal will stand that:

> The conviction on Count II for armed criminal action is reversed. The judgment and sentence is hereby amended by striking each and every reference therein to 'robbery first degree' and substituting therefor 'robbery second degree.' As so amended, the conviction, judgment and sentence under Count I of the information is affirmed.[4]

Warren D. Welliver, Judge

Donnelly, C.J., Seiler, Morgan and Higgins, JJ. concur; Bardgett, J. concurs in concurring opinion filed; Rendlen, J. concurs in part and dissents in part in separate opinion filed.

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4. State v. Kane, ... S.W.2d ..... (Mo.App. 1981), (No. WD 31611, decided August 6, 1981).

(Filed March 9, 1982)

SUPREME COURT OF MISSOURI
EN BANC

No. 63324

STATE OF MISSOURI,
Respondent,

vs.

ANTHONY J. KANE,
Appellant.

CONCURRING OPINION

I concur in the principal opinion and file this concurring opinion to state what the present situation is in Missouri regarding the trial of an armed criminal action charge and the underlying felony. This discussion, of course, was unnecessary to the decision of the principal opinion, but I think it is of some general importance to note that the problem of deciding which conviction shall stand as between armed criminal action and the underlying felony should not occur in cases tried after publication of State ex rel. Westfall v. Ruddy, 621 S.W.2d 42 (Mo. banc 1981).

In *Westfall*, the general question was whether the circuit judge had the authority to order dismissal of either the count charging the underlying felony or the count charging armed criminal action, or whether the state was entitled to try the defendant on both counts. This Court held that the prosecution was entitled to try the accused on both counts, however under the law, the accused could be convicted of only one of them. Therefore, in cases tried after *Westfall*, the jury should convict the accused of armed criminal action if it finds the defendant committed the felony with the use of a deadly weapon and should assess punishment accordingly. If the jury finds the accused

guilty of committing the underlying felony, but without the use of a deadly weapon, it should convict of the underlying felony and assess punishment accordingly.

This leaves the matter to the jury. It will result, however, in one conviction for all that the defendant did and the assessment of one sentence which will be in full accord with the conviction obtained.

John E. Bardgett, Judge

(Filed March 9, 1982)

SUPREME COURT OF MISSOURI
EN BANC

No. 63324

STATE OF MISSOURI,
Respondent,

v.

ANTHONY J. KANE,
Appellant.

OPINION CONCURRING IN PART AND DISSENTING IN PART

I respectfully dissent from that portion of the majority opinion vacating defendant's armed criminal action conviction. Defendant was charged with and convicted of armed criminal action, § 571.015, RSMo 1978 (effective January 1, 1979), and *second* degree robbery, § 569.030, RSMo 1978, (effective January 1, 1979). As the crimes occurred after January 1, 1979, the statutes prescribing these charges are found in the new criminal code, effective on that date.

Without presenting a clear rationale explaining why it chose to strike down one of the convictions instead of

the other, the majority reverses defendant's armed criminal action conviction, vacating the 35 year sentence imposed thereunder, but leaves intact the second degree robbery charge which carried only a seven year sentence. Resorting to the statutory elements test for determining a violation of the double jeopardy proscription, the majority, following *Sours v. State*, 593 S.W.2d 208 (Mo. banc 1980) (*Sours* I), *Sours v. State*, 603 S.W.2d 592 (Mo. banc 1980) (*Sours* II), and *State v. Haggard*, 619 S.W.2d 44 (Mo. banc 1981), in some manner not clear from the opinion applies the doctrine announced in those cases to the crimes at bar. Those cases stand for the proposition that the 5 statutory elements of armed criminal action (§ 559.225.1, RSMo Supp. 1976),

(A) felonious taking,

(B) property of another,

(C) from his person or in his presence,

(D) by violence or fear,

(E) deadly weapon,

equaled and were identical to the 5 statutory elements of robbery first degree by means of a dangerous and deadly weapon (§ 560.120, RSMo 1969, and § 560.135, RSMo Supp. 1975),

(A) felonious taking,

(B) property of another,

(C) from his person or in his presence,

(D) by violence or fear,

(E) deadly weapon.

Concluding that conviction of these equivalent crimes violated double jeopardy, the Court, as previously noted in my dissent in those cases, arbitrarily and without explication of rationale invalidated the armed criminal action convictions but not the robberies. However, in the case

at bar the crimes (robbery second degree and armed criminal action) are *not* equivalent because the statutory elements and the prescribed punishments for each crime differ. The armed criminal action here charged, § 571.015, RSMo 1978, includes the following statutory elements:

(A) stealing,

(B) by use or threat of force,

(C) for an enumerated purpose,

(D) deadly weapon.

The Class B felony of robbery second degree, § 569.030, RSMo 1978, which is a *lesser crime*, includes fewer statutory elements, which are:

(A) stealing,

(B) by use or threat of force,

(C) for an enumerated purpose.

I submit that logic compels that the crime consisting of 4 statutory elements which carries the potential for a greater punishment is the greater offense and that which contains only 3 of those elements and which carries the potential for a lesser punishment is the lesser offense. Nevertheless, the majority curiously holds that conviction of the *lesser* offense precludes conviction and punishment[1] for the *greater*. This quixotic application of the principles announced in *Sours* I, *Sours* II and *Haggard* seems specious and is destined to produce further aberrant results in this area of our criminal law.

In addition, the principal opinion is burdened by other patent inconsistencies. The majority concedes the validity

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1. The punishment prescribed for armed criminal action is 3 years to life without the possibility of parole for the first three years. The punishment for robbery second is 5 years to 15 years without restriction on the eligibilty for parole.

of what it denotes as a simple enhancement statute, stating that the armed criminal action statute under consideration defines a separate crime from the underlying or predicate felony, and the majority asserts that because of this fact any convictions under both statutes involved is violative of the double jeopardy clause. However, for the purpose of determining which conviction shall stand, the majority *now* analogizes armed criminal action to an enhancement statute and pronounces that the so-called underlying felony will always be upheld. Of course, the majority's denomination of the armed criminal action as an enhancement statute in this second breath contradicts the double jeopardy analysis urged in the first.

Finally, if the *Sours* I and II and *Haggard* synthesis is indeed applicable to these crimes which occurred after January 1, 1979, I must further dissent for the reasons set forth in my dissents in *Sours* I and II and *Haggard*.

As noted above, these crimes occurred on March 10, 1979, (after the effective date of the new criminal code, January 1, 1979). The analysis contained in the concurring opinion of Bardgett, J., suggests the decision of this Court in *State ex rel. Westfall v. Ruddy*, 621 S.W.2d 42 (Mo. banc 1981), and its accompanying rationale, as controlling.[2] If that analysis is apt, I would dissent for the reasons set forth in the dissent of Donnelly, C.J., and in my dissent to *Westfall*. Further, if *Westfall* were applied, the result would still be flawed by the arbitrary invalidation of conviction of the greater offense and the upholding of the lesser offense as urged by the concurring opinion of Bardgett, J.

I would affirm defendant's convictions.

Albert L. Rendlen, Judge

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2. However, *sans* rationale, the concurrence restricts *Westfall* to "cases tried after [its] publication." (Bardgett, J. concurring, p. 1).

APPENDIX A-2

OPINION FILED: August 6, 1981

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD31611

STATE OF MISSOURI,
Respondent,

vs.

ANTHONY J. KANE,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE WILLIAM J. PETERS, JUDGE

Before Kennedy, P.J., Shangler, Wasserstrom, JJ.

Defendant appeals from a conviction by jury of robbery in the second degree and armed criminal action, each crime being separately charged in different counts of the information. The jury assessed punishment at seven years under the robbery count and thirty-five years under the count for armed criminal action.

Defendant's three points on appeal may be summarized as follows: (1) that the legislature did not intend to authorize prosecution for and conviction of both robbery second degree and armed criminal action; (2) that robbery second degree is a lesser included offense of armed criminal action, and that conviction and sentences for both placed defendant in double jeopardy in violation of the Fifth and Fourteenth Amendments to the United States Constitution; and (3) that the judgment and sentence erroneously found defendant guilty of robbery first degree.

The offenses charged in this case occurred on March 10, 1979, and are therefore subject to the provisions of The

Criminal Code, which became effective January 1, 1979. The determination of defendant's first two points is therefore controlled by State ex rel. Westfall v. Ruddy, ... S.W.2d ..... [No. 61958] decided by the Missouri Supreme Court en banc July 23, 1981. Under that decision, defendant's convictions under both counts cannot stand.

A difficult problem remains as to what remedy should be adopted. State ex rel. Westfall v. Ruddy, *supra*, holds that the prosecution may submit to a jury a charge of armed criminal action together with a charge of the underlying felony, but in that event the jury must be instructed that it can only find the defendant guilty of one, not both. No such instruction was given in this case. It could be argued logically that the failure to so instruct was reversible error which should require remand for a new trial.

Another possibility would be to say that the proper manner in which the jury should have been instructed on this point would have been pursuant to MAI-CR 2.05 (2nd Ed.), which tells the jury that if it does not find the defendant guilty of the principal offense charged, then it must consider whether he is guilty of a lesser included offense. Had the jury been so instructed in this case, it would have found defendant guilty of armed criminal action and then stopped. It would have had no occasion to go further by undertaking consideration of the robbery charge. On that reasoning, the appropriate remedy would be to set aside the conviction for robbery on Count I.

However, we feel bound to a third course of action, which appears to be required under State v. Fletcher, No. 62049, decided by the Missouri Supreme Court en banc on July 14, 1981. In that case, the defendant was convicted of kidnapping, rape, robbery first degree, and armed criminal action. The instructions, quoted in the opinion, show that the crimes charged were committed on May 17, 1979,

subsequent to the effective date of The Criminal Code. Notwithstanding this time element, which brought the case within the temporal period governed by *Ruddy*, the Court nevertheless held that the proper remedy was to reverse the conviction for armed criminal action in accordance with Sours v. State, 593 S.W.2d 208 (Mo.banc 1980), vacated Missouri v. Sours, 446 U.S. 962 (1980), *on remand* Sours v. State, 603 S.W.2d 592 (Mo.banc 1980), *cert. den.* Missouri v. Sours, ... U.S. ..... (January 26, 1981).

It may be that we have read *Fletcher* too broadly, especially since that opinion was decided before *Ruddy*. Because of our doubt on this matter, and because of the general interest and importance of the question involved, we transfer this case to the Missouri Supreme Court under Rule 83.02.

With respect to defendant's third point, he is correct in saying that the judgment and sentence improperly referred to his having been convicted of robbery first degree. The charge in the information and the verdict of the jury both clearly delineated the crime as being robbery second degree. However, this clerical error does not require reversal, since this court may remedy that mistake under the authority of Rule 30.23. City of Independence v. Peterson, 437 S.W.2d 168 [7] (Mo.App. 1969).

The conviction on Count II for armed criminal action is reversed. The judgment and sentence is hereby amended by striking each and every reference therein to "robbery first degree" and substituting therefor "robbery second degree." As so amended, the conviction, judgment and sentence under Count I of the information is affirmed.

However, for the reason hereinabove stated, this case is transferred to the Missouri Supreme Court.

All concur.

Solbert M. Wasserstrom, Judge

APPENDIX B-1

(Filed March 9, 1982)

SUPREME COURT OF MISSOURI
EN BANC

No. 63325

STATE OF MISSOURI,
Respondent,

vs.

RAY A. THOMPSON,
Appellant.

ON TRANSFER FROM THE COURT OF APPEALS

The appellant-defendant Thompson appealed to the Missouri Court of Appeals, Western District, from convictions and consecutive sentences of fifteen years for robbery second degree (Count I), seventy-five years for armed criminal action (Count II), and fifteen years for kidnapping (Count III). The court of appeals reversed the conviction and sentence on the armed criminal action (the longer sentence) and affirmed the other sentences. On the same date of the opinion in this case, the court of appeals after opinion transferred to this Court the case of State v. Kane, No. 63324, also involving the question whether the armed criminal action sentence or the sentence on the underlying felony should be vacated. In this background, this case also was transferred after opinion because it involved the same issue of general importance. Rule 83.02.

The court of appeals in the instant case reached the correct result when they reversed the armed criminal action sentence. State v. Kane, ... S.W.2d ..... (Mo.

banc 1982), (No. 63324, decided March 9, 1982), heard and decided contemporaneously herewith.

The original opinion of the court of appeals is approved subject to this opinion. A copy of the original court of appeals opinion is attached hereto and is ordered published as the opinion of the court of appeals to be followed in the reporter by this opinion on transfer from the court of appeals. The final judgment on appeal will stand that:

> The conviction for armed criminal action under Count II is reversed and the defendant is discharged from that judgment. The convictions for robbery second degree under Count I and for kidnapping under Count III are affirmed, but the sentences are set aside, and the causes are remanded to the trial court for reimposition of sentences.[1]

Warren D. Welliver, Judge

Donnelly, C.J., Seiler, Morgan, Higgins and Bardgett, JJ. concur; Rendlen, J. concurs in part and dissents in part in separate opinion filed.

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1. State v. Thompson, ... S.W.2d ..... (Mo.App. 1981), (No. WD 31513, decided March 30, 1981).

OPINION FILED March 30, 1981

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 31,513

STATE OF MISSOURI,
Respondent,

vs.

RAY A. THOMPSON,
Appellant.

AN APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
THE HONORABLE WILLIAM J. PETERS, JUDGE

Before Kennedy, P.J., Shangler and Somerville, JJ.

The defendant Thompson appeals from convictions and consecutive sentences of 15 years for robbery second degree [Count I], 75 years for armed criminal action [Count II] and 15 years for kidnapping [Count III]. The court found the defendant both a *persistent offender* and a *dangerous offender* under § 558.016, RSMo 1978, and enhanced the robbery sentence [Count I] by 15 years and the kidnapping sentence [Count III] by 15 years. The punishments were for a total of 135 consecutive years.

The convictions rest on a robbery of an automobile from the person of one McLin, her forced asportation in the vehicle, threats to her in the course, the robbery of other goods from her person, and eventual release. The proof of the offenses rested, among other evidence, on the identification of the defendant as the perpetrator. The defendant raised the competency of that evidence in limine by a motion to suppress the lineup and in-court identifica-

tions made by witness McLin, and by the motion for new trial.

The evidence most favorable to the verdict shows that McLin had concluded purchases at a market and as she proceeded to place them in her car, an object pressed into her side. She turned, looked down, and saw a man [identified as defendant] crouched with a pistol aimed at her. He looked directly at her and ordered her into the car. She noticed that he wore an orange turtleneck sweater extended over the neck, chin, mouth and beneath the nose. The nose, itself, and forehead were visible; the eyes were distinctively ruddy. She noticed the other garb: jeans, short jacket and a cap atop the head from which protruded hair in unusual braids. The man pushed her into the car, a red and white Mercury, took the keys, and drove off. The abduction was at about 2:30 in the afternoon. She entreated the man to take the car and let her go, but he told her to shut up. He spied a police car ahead, and directed that she keep her head to the side or he would "blow her brains out" - that he had killed five people that week and "one more black bitch . . . . wouldn't make no difference." The car finally stopped at a wooded area. She was told to get out and "run in front of the car before he blowed my brains out." The man took the money from her wallet, kept the grocery purchases, and drove off with the vehicle. McLin ran into Swope Park woods and hid behind a clump of snow, fearful that the gunman meant to kill her. She then ran to the road and was given assistance by a motorist. The lapse between abduction and release was about an hour and a half. Some three days later, McLin identified the defendant Thompson as the robber-abductor from among a display of four black males conducted by the police. [The defendant was taken into custody while

in operation of the stolen vehicle after pursuit and capture.]

One point of error on appeal asserts that the preindictment and trial identification of the defendant by witness McLin were unreliable. The former by virtue of impermissibly suggestive police procedures and the latter identification from want of time to observe. The identification evidence was received at the trial without timely objection, however, so the contention of error was not preserved. State v. McFadden, 530 S.W.2d 440, 444[5,6] (Mo. App. 1975). The merits of the contention considered, the lineup procedures were not tainted with undue suggestiveness, nor was there want of opportunity for the witness during the prolonged episode of abduction, asportation and robbery to observe salient aspects of the features of the perpetrator. That the witness did not notice prominences on the forehead of the defendant and was inconsistent in particulars among the various recountals of that description, does not render the in-court identification so untrustworthy as to invalidate the proof. The garb used by the robber to distort identity may very well have succeeded to conceal that distinctive facial feature. The identification by witness McLin of the defendant as the criminal was insistent from the very first identification encounter. In the totality of circumstances [according to the prescriptions of State v. Higgins, 592 S.W.2d 151, 160[13,14] (Mo. banc 1979)], the in-court identification by the witness that the defendant was the abductor-robber rests on reliable evidence and serves as an independent basis for the competency of the proof. State v. White, 549 S.W.2d 914, 917[2] (Mo. App. 1977).

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started up and drove away. The police car followed, then sounded the siren and gave pursuit. The other automobile slid into a snow bank and the driver [identified as the defendant] emerged. The officer recognized him as Ray Thompson, jumped out of the car, and shouted: "Thompson, police! Halt!" The man gave no heed but ran off into an apartment project area where, after a chase and search, he was apprehended in the bathroom of a vacant flat. The defendant contends that this shout of recognition amounts to evidence of a separate and distinct crime from that charged at the trial, and so is prejudicial. The objection to the testimony was delayed until after the full narrative of chase, recognition and identification of the driver as the defendant on trial were fully in evidence, and then repeated. Even then, the only remedy sought was for a mistrial.

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The defendant contends next that the abduction and asportation of McLin under threat was to accomplish the robbery of her automobile and so, as an incident of the robbery, was not subject to prosecution as a separate crime - kidnapping. The defendant cites kidnapping statute, § 565.100, RSMo 1978, and the commentary to the [then] proposed criminal code to sustain that exegesis. We do not suggest the contention has validity under the evidence, but rather do not reach a review because the claim of error was not preserved in the motion for new trial. State v. Wells, 585 S.W.2d 267, 268[4,5] (Mo. App. 1979).

The court exercised the authority given by §§ 558.016 and 558.021 to extend the term of a *persistent* or *dangerous offender* to enhance the punishment of 15 years returned by the jury against the defendant on each, Count I [robbery] and Count III [kidnapping] by an additional 15 years each. The defendant contends that the judgment unlawfully declared the 15-year enhancements as additional sentences rather than merely extensions of the sentences returned by the jury, so that the adjudications against the defendant on the three counts result, not in three convictions, but in five convictions. The defendant contends also that the court neglected the directive of § 558.021.1(3) that specific findings by the court as to the *existence of the basis for the extended term* precondition imposition.[1]

---

1. § 558.021. Extended term procedures

1. The court shall not impose an extended term under section 558.016 unless

(1) The indictment or information, original, amended or in lieu of an indictment, pleads all essential facts warranting imposition of an extended term; and

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The extended term section 558.016[2] of the recently adopted criminal code invests a trial court with the altogether new power to enhance a sentence of imprisonment beyond that determined by the jury or prescribed by statute as punishment for the offense. The *persistent offender*

Footnote continued—

an extended term is presented in open court with full rights of confrontation and cross-examination, and with the defendant having the opportunity to present evidence; and

(3) The court determines the existence of the basis for the extended term and makes specific findings to that effect.

2. Nothing in this section shall prevent the use of presentence investigations or commitments under sections 557.026 and 557.031, RSMo.

3. At the sentencing hearing both the state and the defendant shall be permitted to present additional information bearing on the issue of sentence.

2. § 558.016. Extended terms for dangerous offenders

1. The court may sentence a person who had pleaded guilty to or has been found guilty of a class B, C, or D felony to an extended term of imprisonment if it finds the defendant is a persistent offender or a dangerous offender.

2. A "persistent offender" is one who has been previously convicted of two felonies committed at different times and not related to the instant crime as a single criminal episode.

3. A "dangerous offender" is one who:

(1) Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and

(2) Has been previously convicted of a class A or B felony or of a dangerous felony.

4. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class A felony, any sentence authorized for a class A felony;

(2) For a class B felony, a term of years not to exceed thirty years;

(3) For a class C felony, a term of years not to exceed fifteen years;

(4) For a class D felony, a term of years not to exceed ten years.

component of the statute [§ 558.016.2] replaces and reclothes the former second offender procedure [repealed § 556.280]. The *dangerous offender* component of the statute [§ 558.016.3], however, enacts an entirely unique theory of punishment. The imposition of an extended term by either means, however, rests on the proof of a charge beyond the offense for which the jury returned conviction. The due process of law concomitant by which a valid criminal conviction obtains, therefore, also attends the determination of the new matter upon which a valid extension of term rests. Specht v. Patterson, 386 U.S. 605, 610[5] (1967); The New Missouri Criminal Code: Manual for Court Related Personnel, §§ 3.3, 3.4. The statute heeds the constitutional necessity for notice and hearing by provisions that the information formally plead the intention to invoke the extended term penalty and the facts upon which that imposition rests [§ 558.021.1 (1)], proof by evidence in open court subject to the cross-examination and opportunity to defend [§ 558.021.1(2)], and the determination of basis for the extended term by specific finding - presumably, beyond a reasonable doubt § 558.021.1(3)]. State v. Berry, 609 S.W.2d 948, 954 [20] (Mo. banc 1980).

That the statute, conformed to the exigency of due process, prescribes a separate proceeding after the adjudication of guilt to adjudicate further the issue of an extended sentence, however, does not mean that the term of punishment declared by the jury verdict and the term of punishment as extended adjudge two separate sentences against the defendant. The code shows a different scheme. In the usual sequence of criminal procedure, the imposition of sentence follows upon the adjudication of guilt. [§ 557.036.1]. Where the defendant is found to be a persistent or dangerous offender, however, "the court shall proceed as provided in § 558.016." [§ 557.036.3-(2)(a)(b)].

That latter section authorizes that the *total* maximum term for a persistent or dangerous offender convicted of a class B felony [second-degree robbery] shall be "a term of years not to exceed thirty years." [§ 558.016.4(1)]. The code clearly contemplates that the determination of *persistent* or *dangerous offender* [any more than the adjudication of *habitual criminal* under the second offender act now repealed - State v. Maxwell, 411 S.W.2d 237, 239[1,2] (Mo. 1967)] does not constitute a separate offense, but that a single sentence culminates from a single accusation and adjudication of guilt. Sours v. State, 603 S.W.2d 592, 605 (Mo. banc 1980); North Carolina v. Pearce, 395 U.S. 711, 717[1] (1969). The determination of persistent or dangerous offender results in one extended term, not two separately imposed. State v. Johnson, 605 S.W.2d 151, 155[8] (Mo. App. 1980).

The persistent and dangerous offender procedures merely *allow*, they do not compel, the court to extend sentence. § 558.016.1. Thus, the imposition of sentence and judgment for a conviction returned on an information which alleges also the basis for an extended term of punishment, is properly deferred until the court adjudicates the issue and then determines from the full sources [§ 558.021.2 and 3] the condign enhancement - if any. The New Missouri Criminal Code: Manual for Court Related Personnel § 3.3.

The defendant Thompson complains that the extended sentences imposed by the trial court on Count I [robbery] and Count III [kidnapping] were not single and unitary, as contemplated by the statute, but double and separate, and so invalid.

The indictment pleaded three separate counts: robbery, armed criminal action and kidnapping. To enhance punishment on Count I and Count III, the indictment

pleaded also that the defendant Thompson was both a persistent and a dangerous offender within § 558.016. The jury returned verdicts of guilty on each count and declared sentences on Count I [robbery] of 15 years, on Count II [armed criminal action] of 75 years and on Count III [kidnapping] of 15 years. In due course, the motion for new trial was overruled and the court gave allocution, pronounced judgment in accordance with the verdicts of the jury, and ordered that the sentences run consecutively. In immediate sequence, the court received evidence from the prosecutor of prior convictions to prove the issue of persistent offender, and then took notice of the evidence of the prosecutions under the indictment to prove the issue of dangerous offender. At the conclusion of the evidence the court adjudged: "that defendant is both a persistent offender and a dangerous offender . . . [and therefore] enhances the sentence in Count I an additional fifteen years [and] the punishment in Count III an additional fifteen years. All of said sentences are to be consecutive."

On the face, the two separate impositions of sentences - once upon the jury verdicts and again upon the court determination of persistent and dangerous offender - compound a single sentence into two so that the convictions on the three counts result in five sentences, rather than three. That procedure violates both the rationale of the statutes [§§ 557.036, 558.016 and 558.021] that under a persistent offender or dangerous offender adjudication, the court shall assess punishment in the first instance by a single - albeit enhanced - sentence. State v. Hampton, 607 S.W.2d 225, 226[4,5] n. 1 (Mo. App. 1980). The jury declaration of punishment does not bear on that exercise of judicial function. On the face, also, the separate sentences on Count I and the separate sentences on Count III treat the extended sentence not as an enhancement

of punishment but as an additional punishment for the same offense, and so offends constitutional double jeopardy. Sours v. State, 603 S.W.2d 592, 603 (Mo. banc 1980); North Carolina v. Pearce, 395 U.S. 711, 717[1] (1969). The procedure also treats the extended term inquiry as a separate prosecution and so amounts to a reprosecution after conviction, a practice also within the prohibition of double jeopardy. O'Clair v. United States, 470 F.2d 1199, 1203[4, 5] (1st Cir. 1972).

We cannot determine from the sentences adjudged on Count I and Count III: the 15-year term returned by the jury and imposed by the court as enhanced by the 15-year term imposed by the court and made consecutive to the sentence adjudged on the jury verdict - whether the court understood its statutory prerogative under §§ 557.036 and 558.016 to decide and assess sentence in the first instance. The maximum extended term authorized for each, robbery in the second degree and kidnapping, [class B felonies] is a term of years *not to exceed thirty years*. § 558.016.4(1). The compound sentences on each Count I and Count III do not exceed the statutory limit, but are not derived validly Count I and Count III are remanded, therefore, for adjudgment of no more than a single extended term on each count.

The defendant Thompson contends that the extended terms were not validly adjudicated for the additional reason that they do not rest on specific findings of the basis for the enhanced punishments. The extended term procedures of § 558.021 provide:

> 1. The court *shall not impose an extended term* under section 558.016 *unless*
>
> (1) The indictment or information . . . pleads all essential facts warranting imposition of an extended term; and

(2) After a finding of guilty . . . a sentencing hearing is held at which evidence establishing basis for an extended term is presented in open court with full rights of confrontation and cross-examination, and with the defendant having the opportunity to present evidence; and

(2) *The court determines the existence of the basis for the extended term and makes specific findings to that effect.* [emphasis added]

The peremptory tone of the statute - at lease as to subsection (2) - is only ostensible. Our Supreme Court en banc has determined that the procedure to determine the basis for the extended term, with attendant rights of confrontation and cross-examination and opportunity to make proof, need not entail new evidence - but may rest on judicial notice of the conviction proceedings. State v. Berry, 609 S.W.2d 948, 954[20] (Mo. banc 1980). [But see, concurrence in part and dissent in part of Bardgett, C.J.; dissent of Seiler, J.]; The New Criminal Code: Manual for Court Related Personnel, § 3.4.

The defendant does not complain of the evidential aspect of the extended term proceeding, however, but only that the findings of fact were not determined as predicate to enhanced sentence as directed by subsection (3) of the statute. At the conclusion of the proofs on the indictment allegations of persistent offender and dangerous offender the court recited:

> The Court does find that the defendant is one who has been previously convicted of two felonies at different times, and not related to the instant crime.
>
> The Court further finds that defendant is being sentenced for a felony, during the commission of which he knowingly endangered or threatened the life of

another person, or knowingly threatened to inflict serious physical injury on another person.

The Court, therefore, finds that defendant is both a persistent offender and a dangerous offender.

The Court, therefore, enhances the sentence . . . . The theory of the notice by indictment, adversary hearing, and determinations of fact anew, antecedent to an extended term adjudication under § 558.021 is that the imposition of an enhanced sentence goes beyond the verdict of guilty and so must be sustained by an independent basis of fact determined by due process of law. Specht v. Patterson, 386 U.S. 605, 610[5] (1967). Our Supreme Court en banc determined in State v. Berry, supra, l.c. 954[20] that the extended term procedure for *dangerous offender* does not require new evidence but may rest on the judicial notice of the conviction proceedings recently concluded. The finding of the trial court, antecedent to imposition of enhanced punishment, that the "defendant had previously been convicted of a dangerous felony, forcible rape . . . and defendant had 'knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person'" was the predicate for enhancement of sentence. The findings of the trial court to extend the term against the defendant Thompson as a *dangerous offender* are without distinctive difference. That contention is denied on the authority of State v. Berry, supra. [But see, concurrence in part and dissent in part of Bardgett, C.J., and dissent of Seiler, J.] The extended terms of Count I and Count III rest on evidence of dangerous offender presented and found.

A trial court determination of *persistent offender*, however, necessarily rests on new evidence not given to the

jury,[3] so that the findings are not made implicit by the conviction, but must be found expressly as the basis for the extended term by *specific findings to that effect.* § 558.021.1(3). That conforms to the concern of due process that a punishment enhanced beyond that otherwise allowable under a jury conviction of guilt rest on an independent basis of evidence. Specht v. Patterson, 386 U.S. 605, 610 [5] (1967). The decisions under superseded § 556.280(2) [Habitual Criminal Act] that the neglect of the judge to enter specific findings did not invalidate the effect of that section [State v. Blackwell, 459 S.W.2d 268, 272[3] (Mo. banc 1970)] have no authority as precedent. The scheme of the Habitual Criminal Act was merely to transpose the duty to sentence from the jury to the judge - but only within the limits permitted for that offense. State v. Maxwell, 376 S.W.2d 170, 174[12,13] (Mo. 1964). The *persistent offender* statute, rather, *extends* the punishment beyond that otherwise imposable by law for the offense - in this case, from 15 years to 30 years for robbery second degree and kidnapping [each a Class B felony]. Another distinction marks the present *persistent offender* procedure from the former habitual criminal procedure. The statute does not impose a peremptory duty on the judge to extend sentence even after a determination of *persistent offender.*[4] Thus, the court may conform to the jury assessment of punishment as more efficacious than enhancement. The habitual criminal procedure simply

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3. Section 558.016.2

A "persistent offender" is one who has been previously convicted of two felonies committed at different times and not related to the instant crime as a single criminal episode.

4. Section 558.016.1.

This court *may* sentence a person . . . to an extended term of imprisonment if it finds the defendant is a persistent offender [emphasis added]

took the function of punishment assessment from the jury altogether, even as a tentative advisement.

The persistent offender was pleaded by Count I and Count III of the indictment by specific allegations that:

> (1) On or about October 1, 1971, defendant, RAY A. THOMPSON a/k/a Ray Anthony Thompson, was convicted of the felony of Robbery in the First Degree in Division One of the Circuit Court of Jackson County, Missouri, C-40365, and
>
> (2) On or about July 29, 1975, the defendant, RAY A. THOMPSON a/k/a Ray Anthony Thompson, was convicted of the felony of Robbery in Division Four of the District Court of Wyandotte County, Kansas, No. 21112Cr.

The previous convictions were the basis for extended punishment as a persistent offender. They were proved by evidence on that separate issue after the jury verdict. The defendant does not dispute the validity of that proof as the basis for an extended term, *if specifically found* to that effect. The court found: "that the defendant is one who has been previously convicted of two felonies at different times, and not related to the instant crime." That does not suffice. The statute contemplates that the convictions be found according to indictment, that the proof shall conform with the charge, and that the findings describe the offenses which constitute the proof.

We conclude that the extended term for *persistent offender* was imposed without the determination of the *existence of the basis* for that enhancement of punishment prerequisite to that exercise of judicial authority. § 558.021.1(3). The extended terms on Count I and Count III rest validly, otherwise, on the determination that the

defendant was a dangerous offender. Those judgments will not be disturbed, other than for reimposition of sentence for the other reasons given.

The final point contends that the conviction for the Count I robbery second degree [in this case, committed by deadly weapon] and the conviction for the Count II armed criminal action violates constitutional principle. It has been decided authoritatively that convictions for both armed criminal action and the underlying felony infringes the prohibition against double jeopardy. Sours v. State, 603 S.W.2d 592 (Mo. banc 1980).

The conviction for armed criminal action under Count II is reversed and the defendant is discharged from that judgment. The convictions for robbery second degree under Count I and for kidnapping under Count III are affirmed, but the sentences are set aside, and the causes are remanded to the trial court for reimposition of sentences. All concur.

Charles Shangler, Judge

(Filed March 9, 1982)

SUPREME COURT OF MISSOURI
EN BANC

No. 63325

STATE OF MISSOURI,
Respondent,

v.

RAY A. THOMPSON,
Appellant.

OPINION CONCURRING IN PART AND DISSENTING IN PART

The crimes of second degree robbery and armed criminal action,[1] for which the defendant was charged and convicted, occurred on January 24, 1979. His second degree robbery conviction, § 569.030, RSMo 1978, resulted in a 15 year term of imprisonment, while under the armed criminal action conviction, § 571.015, RSMo 1978, he received a 75 year sentence.

I respectfully dissent in part and concur in part for the reasons expressed in my separate opinion in *State v. Kane*, decided concurrently herewith. I would affirm.

Albert L. Rendlen, Judge

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1. There is no issue regarding the kidnapping conviction and its accompanying 15 year sentence considered by the majority in this appeal. Extended terms of imprisonment (15 years each) were additionally imposed for the robbery and kidnapping convictions under § 558.016, RSMo 1978.

APPENDIX B-2

OPINION FILED March 30, 198

IN THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 31,513

STATE OF MISSOURI,
Respondent,

vs.

RAY A. THOMPSON,
Appellant.

An Appeal from the Circuit Court of Jackson County
The Honorable William J. Peters, Judge
Before Kennedy, P.J., Shangler and Somerville, JJ.

The defendant Thompson appeals from convictions and consecutive sentences of 15 years for robbery by a deadly weapon [Count I], 75 years for armed criminal action [Count II] and 15 years for kidnapping [Count III]. The court found the defendant both a *persistent offender* and a *dangerous offender* under § 558.016, RSMo 1978, and enhanced the robbery sentence [Count I] by 15 years and the kidnapping sentence [Count III] by 15 years. The punishments were for a total of 135 consecutive years.

The convictions rest on a robbery of an automobile from the person of one McLin, her forced asportation in the vehicle, threats to her in the course, the robbery of other goods from her person, and eventual release. The proof of the offenses rested, among other evidence, on the identification of the defendant as the perpetrator. The defendant raised the competency of that evidence in limine by a motion to suppress the line-up and in-court identifica-

tions made by witness McLin, and by the motion for new trial.

The evidence most favorable to the verdict shows that McLin had concluded purchases at a market and as she proceeded to place them in her car, an object pressed into her side. She turned, looked down, and saw a man [identified as defendant] crouched with a pistol aimed at her. He looked directly at her and ordered her into the car. She noticed that he wore an orange turtleneck sweater extended over the neck, chin, mouth and beneath the nose. The nose, itself, and forehead were visible; the eyes were distinctively ruddy. She noticed the other garb: jeans, short jacket and a cap atop the head from which protruded hair in unusual braids. The man pushed her into the car, a red and white Mercury, took the keys, and drove off. The abduction was at about 2:30 in the afternoon. She entreated the man to take the car and let her go, but he told her to shut up. He spied a police car ahead, and directed that she keep her head to the side or he would "blow her brains out" - that he had killed five people that week and "one more black bitch . . . wouldn't make no difference." The car finally stopped at a wooded area. She was told to get out and "run in front of the car before he blowed my brains out." The man took the money from her wallet, kept the grocery purchases, and drove off with the vehicle. McLin ran into Swope Park woods and hid behind a clump of snow, fearful that the gunman meant to kill her. She then ran to the road and was given assistance by a motorist. The lapse between abduction and release was about an hour and a half. Some three days later McLin identified the defendant Thompson as the robber-abductor from among a display of four black males conducted by the police. [The defendant was taken into custody while

in operation of the stolen vehicle after pursuit and capture.]

One point of error on appeal asserts that the preindictment and trial identification of the defendant by witness McLin were unreliable. The former by virtue of impermissibly suggestive police procedures and the latter identification from want of time to observe. The identification evidence was received at the trial without timely objection, however, so the contention of error was not preserved. State v. McFadden, 530 S.W.2d 440, 444[5,6] (Mo. App. 1975). The merits of the contention considered, the lineup procedures were not tainted with undue suggestiveness, nor was there want of opportunity for the witness during the prolonged episode of abduction, asportation and robbery to observe salient aspects of the features of the perpetrator. That the witness did not notice prominences on the forehead of the defendant and was inconsistent in particulars among the various recountals of that description, does not render the in-court identification so untrustworthy as to invalidate the proof. The garb used by the robber to distort identity may very well have succeeded to conceal that distinctive facial feature. The identification by witness McLin of the defendant as the criminal was insistent from the very first identification encounter. In the totality of circumstances [according to the prescriptions of State v. Higgins, 592 S.W.2d 151, 160[13,14] (Mo. banc 1979)], the in-court identification by the witness that the defendant was the abductor-robber rests on reliable evidence and serves as an independent basis for the competency of the proof. State v. White, 549 S.W.2d 914, 917[2] (Mo. App. 1977).

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The court exercised the authority given by §§ 558.016 and 558.021 to extend the term of a *persistent* or *dangerous offender* to enhance the punishment of 15 years returned by the jury against the defendant on each, Count I [robbery] and Count III [kidnapping] by an additional 15 years each. The defendant contends that the judgment unlawfully declared the 15-year enhancements as additional sentences rather than merely extensions of the sentences returned by the jury, so that the adjudications against the defendant on the three counts result, not in three convictions, but in five convictions. The defendant contends also that the court neglected the directive of § 558.021.1(3) that specific findings by the court as to the *existence of the basis for the extended term* precondition imposition.[1]

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Footnote continued—

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(1) Is being sentenced for a felony during the commission of which he knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person; and

(2) Has been previously convicted of a class A or B felony or of a dangerous felony.

4. The total authorized maximum terms of imprisonment for a persistent offender or a dangerous offender are:

(1) For a class A felony, any sentence authorized for a class A felony;

(2) For a class B felony, a term of years not to exceed thirty years;

(3) For a class C felony, a term of years not to exceed fifteen years;

(4) For a class D felony, a term of years not to exceed ten years.

component of the statute [§ 558.016.2] replaces and reclothes the former second offender procedure [repealed § 556.280]. The *dangerous offender* component of the statute § 558.016.3], however, enacts an entirely unique theory of punishment. The imposition of an extended term by either means, however, rests on the proof of a charge beyond the offense for which the jury returned conviction. The due process of law concomitant by which a valid criminal conviction obtains, therefore, also attends the determination of the new matter upon which a valid extension of term rests. Specht v. Patterson, 386 U.S. 605, 610[5] (1967); The New Missouri Criminal Code: Manual for Court Related Personnel, §§ 3.3, 3.4. The statute heeds the constitutional necessity for notice and hearing by provisions that the information formally plead the intention to invoke the extended term penalty and the facts upon which that imposition rests [§ 558.021.1 (1)], proof by evidence in open court subject to the cross-examination and opportunity to defend [§ 558.021.1(2)], and the determination of basis for the extended term by specific finding - presumably, beyond a reasonable doubt [§ 558.021.1(3)]. State v. Berry, 609 S.W.2d 948, 954 [20] (Mo. banc 1980).

That the statute, conformed to the exigency of due process, prescribes a separate proceeding after the adjudication of guilt to adjudicate further the issue of an extended sentence, however, does not mean that the term of punishment delcared by the jury verdict and the term of punishment as extended adjudge two separate sentences against the defendant. The code shows a different scheme. In the usual sequence of criminal procedure, the imposition of sentence follows upon the adjudication of guilt. [§ 557.036.1]. Where the defendant is found to be a persistent or dangerous offender, however, "the court shall proceed as provided in § 558.016." [§ 557.036.3-(2)(a)(b)].

That latter section authorizes that the *total* maximum term for a persistent or dangerous offender convicted of a class B felony [second-degree robbery] shall be "*a term* of years not to exceed thirty years." [§ 558.016.4(1)]. The code clearly contemplates that the determination of *persistent* or *dangerous offender* [any more than the adjudication of *habitual criminal* under the second offender act now repealed - State v. Maxwell, 411 S.W.2d 237, 239[1,2] (Mo. 1967)] does not constitute a separate offense, but that a single sentence culminates from a single accusation and adjudication of guilt. Sours v. State, 603 S.W.2d 592, 605 (Mo. banc 1980); North Carolina v. Pearce, 395 U.S. 711, 717[1] (1969). The determination of persistent or dangerous offender results in one extended term, not two separately imposed. State v. Johnson, 605 S.W.2d 151, 155[8] (Mo. App. 1980).

The persistent and dangerous offender procedures merely *allow*, they do not compel, the court to extend sentence. § 558.016.1. Thus, the imposition of sentence and judgment for a conviction returned on an information which alleges also the basis for an extended term of punishment, is properly deferred until the court adjudicates the issue and then determines from the full sources [§ 558.021.2 and 3] the condign enhancement - if any. The New Missouri Criminal Code: Manual for Court Related Personnel § 3.3.

The defendant Thompson complains that the extended sentences imposed by the trial court on Count I [robbery] and Count III [kidnapping] were not single and unitary as contemplated by the statute, but double and separate, and so invalid.

The indictment pleaded three separate counts: robbery, armed criminal action and kidnapping. To enhance punishment on Count I and Count III, the indictment

pleaded also that the defendant Thompson was both a persistent and a dangerous offender within § 558.016. The jury returned verdicts of guilty on each count and declared sentences on Count I [robbery] of 15 years, on Count II [armed criminal action] of 75 years and on Count III [kidnapping] of 15 years. In due course, the motion for new trial was overruled and the court gave allocution, pronounced judgment in accordance with the verdicts of the jury, and ordered that the sentences run consecutively. In immediate sequence, the court received evidence from the prosecutor of prior convictions to prove the issue of persistent offender, and then took notice of the evidence of the prosecutions under the indictment to prove the issue of dangerous offender. At the conclusion of the evidence the court adjudged: "that defendant is both a persistent offender and a dangerous offender . . . [and therefore] enhances the sentence in Count I an additional fifteen years [and] the punishment in Count III an additional fifteen years. All of said sentences are to be consecutive."

On the face, the two separate impositions of sentences - once upon the jury verdicts and again upon the court determination of persistent and dangerous offender - compound a single sentence into two so that the convictions on the three counts result in five sentences, rather than three. That procedure violates both the rationale of the statutes [§§ 557.036, 558.016 and 558.021] that under a persistent offender or dangerous offender adjudication, the court shall assess punishment in the first instance by a single - albeit enhanced - sentence. State v. Hampton, 607 S.W.2d 225, 226[4,5] n. 1 (Mo. App. 1980). The jury declaration of punishment does not bear on that exercise of judicial function. On the face, also, the separate sentences on Count I and the separate sentences on Count III treat the extended sentence not as an enhancement

of punishment but as an additional punishment for the same offense, and so offends constitutional double jeopardy. Sours v. State, 603 S.W.2d 592, 603 (Mo. banc 1980); North Carolina v. Pearce, 395 U.S. 711, 717[1] (1969). The procedure also treats the extended term inquiry as a separate prosecution and so amounts to a reprosecution after conviction, a practice also within the prohibition of double jeopardy. O'Clair v. United States, 470 F.2d 1199, 1203[4, 5] (1st Cir. 1972).

We cannot determine from the sentences adjudged on Count I and Count III: the 15-year term returned by the jury and imposed by the court as enhanced by the 15-year term imposed by the court and made consecutive to the sentence adjudged on the jury verdict - whether the court understood its statutory prerogative under §§ 557.036 and 558.016 to decide and assess sentence in the first instance. The maximum extended term authorized for each, robbery in the second degree and kidnapping, [class B felonies] is a term of years *not to exceed thirty years*. § 558.016.4(1). The compound sentences on each Count I and Count III do not exceed the statutory limit, but are not derived validly. Count I and Count III are remanded, therefore, for adjudgment of no more than a single extended term on each count.

The defendant Thompson contends that the extended terms were not validly adjudicated for the additional reason that they do not rest on specific findings of the basis for the enhanced punishments. The extended term procedures of § 558.021 provide:

> 1. The court *shall not impose an extended term* under section 558.016 *unless*
>
> (1) The indictment or information . . . pleads all essential facts warranting imposition of an extended term; and

(2) After a finding of guilty . . . a sentencing hearing is held at which evidence establishing basis for an extended term is presented in open court with full rights of confrontation and cross-examination, and with the defendant having the opportunity to present evidence; and

(2) *The court determines the existence of the basis for the extended term and makes specific findings to that effect.* [emphasis added]

The peremptory tone of the statute - at least as to subsection (2) - is only ostensible. Our Supreme Court en banc has determined that the procedure to determine the basis for the extended term, with attendant rights of confrontation and cross-examination and opportunity to make proof, need not entail new evidence - but may rest on judicial notice of the conviction proceedings. State v. Berry, 609 S.W.2d 948, 954[20] (Mo. banc 1980). [But see, concurrence in part and dissent in part of Bardgett, C.J.; dissent of Seiler, J.]; The New Criminal Code: Manual for Court Related Personnel, § 3.4.

The defendant does not complain of the evidential aspect of the extended term proceeding, however, but only that the findings of fact were not determined as predicate to enhanced sentence as directed by subsection (3) of the statute. At the conclusion of the proofs on the indictment allegations of persistent offender and dangerous offender the court recited:

> The Court does find that the defendant is one who has been previously convicted of two felonies at different times, and not related to the instant crime.
>
> The Court further finds that defendant is being sentenced for a felony, during the commission of which

he knowingly endangered or threatened the life of another person, or knowingly threatened to inflict serious physical injury on another person.

The Court, therefore, finds that defendant is both a persistent offender and a dangerous offender.

The Court, therefore, enhances the sentence . . . . The theory of the notice by indictment, adversary hearing, and determinations of fact anew, antecedent to an extended term adjudication under § 558.021 is that the imposition of an enhanced sentence goes beyond the verdict of guilty and so must be sustained by an independent basis of fact determined by due process of law. Specht v. Patterson, 386 U.S. 605, 610[5] (1967). Our Supreme Court en banc determined in State v. Berry, supra, l.c. 954[20] that the extended term procedure for *dangerous offender* does not require new evidence but may rest on the judicial notice of the conviction proceedings recently concluded. The finding of the trial court, antecedent to imposition of enhanced punishment, that the "defendant had previously been convicted of a dangerous felony, forcible rape . . . and defendant had 'knowingly murdered or endangered or threatened the life of another person or knowingly inflicted or attempted or threatened to inflict serious physical injury on another person' " was the predicate for enhancement of sentence. The findings of the trial court to extend the term against the defendant Thompson as a *dangerous offender* are without distinctive difference. That contention is denied on the authority of State v. Berry, supra. [But see, concurrence in part and dissent in part of Bardgett, C.J., and dissent of Seiler, J.] The extended terms of Count I and Count III rest on evidence of dangerous offender presented and found.

A trial court determination of *persistent offender*, however, necessarily rests on new evidence not given to the

jury,[3] so that the findings are not made implicit by the conviction, but must be found expressly as the basis for the extended term by *specific findings to that effect.* § 558.021.1(3). That conforms to the concern of due process that a punishment enhanced beyond that otherwise allowable under a jury conviction of guilt rest on an independent basis of evidence. Specht v. Patterson, 386 U.S. 605, 610 [5] (1967). The decisions under superseded § 556.280(2) [Habitual Criminal Act] that the neglect of the judge to enter specific findings did not invalidate the effect of that section [State v. Blackwell, 459 S.W.2d 268, 272[3] (Mo. banc 1970)] have no authority as precedent. The scheme of the Habitual Criminal Act was merely to transpose the duty to sentence from the jury to the judge - but only within the limits permitted for that offense. State v. Maxwell, 376 S.W.2d 170, 174[12,13] (Mo. 1964). The *persistent offender* statute, rather, *extends* the punishment beyond that otherwise imposable by law for the offense - in this case, from 15 years to 30 years for robbery second degree and kidnapping [each a Class B felony]. Another distinction marks the present *persistent offender* procedure from the former habitual criminal procedure. The statute does not impose a peremptory duty on the judge to extend sentence even after a determination of *persistent offender.*[4] Thus, the court may conform to the jury assessment of punishment as more efficacious than enhancement. The habitual criminal procedure simply

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3. Section 558.016.2

A "persistent offender" is one who has been previously convicted of two felonies committed at different times and not related to the instant crime as a single criminal episode.

4. Section 558.016.1.

This court *may* sentence a person . . . to an extended term of imprisonment if it finds the defendant is a persistent offender. [emphasis added]

took the function of punishment assessment from the jury altogether, even as a tentative advisement.

The persistent offender was pleaded by Count I and Count III of the indictment by specific allegations that:

> (1) On or about October 1, 1971, defendant, RAY A. THOMPSON a/k/a Ray Anthony Thompson, was convicted of the felony of Robbery in the First Degree in Division One of the Circuit Court of Jackson County, Missouri, C-40365, and
>
> (2) On or about July 29, 1975, the defendant, RAY A. THOMPSON a/k/a Ray Anthony Thompson, was convicted of the felony of Robbery in Division Four of the District Court of Wyandotte County, Kansas, No. 21112Cr.

The previous convictions were the basis for extended punishment as a persistent offender. They were proved by evidence on that separate issue after the jury verdict. The defendant does not dispute the validity of that proof as the basis for an extended term, *if specifically found* to that effect. The court found: "that the defendant is one who has been previously convicted of two felonies at different times, and not related to the instant crime." That does not suffice. The statute contemplates that the convictions be found according to indictment, that the proof shall conform with the charge, and that the findings describe the offenses which constitute the proof.

We conclude that the extended term for *persistent offender* was imposed without the determination of the *existence of the basis* for that enhancement of punishment prerequisite to that exercise of judicial authority. § 558.021.1(3). The extended terms on Count I and Count III rest validly, otherwise, on the determination that the

defendant was a dangerous offender. Those judgments will not be disturbed, other than for reimposition of sentence for the other reasons given.

The final point contends that the conviction for the County I robbery second degree [in this case, committed by deadly weapon] and the conviction for the Count II armed criminal action violates constitutional principle. It has been decided authoritatively that convictions for both armed criminal action and the underlying felony infringes the prohibition against double jeopardy. Sours v. State, 603 S.W.2d 592 (Mo. banc 1980).

The conviction for armed criminal action under Count II is reversed and the defendant is discharged from that judgment. The convictions for robbery second degree under Count I and for kidnapping under Count III are affirmed, but the sentences are set aside, and the causes are remanded to the trial court for reimposition of sentences. All concur.

Charles Shangler, Judge

APPENDIX C-1

(Filed March 9, 1982)

SUPREME COURT OF MISSOURI
DIVISION II

No. 62999

STATE OF MISSOURI,
Respondent,

vs.

CHARLES ARNOLD,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE JAMES A. MOORE, JUDGE

Appellant was charged with Class B rape in Count I, a violation of § 566.030,[1] armed criminal action in Count II, a violation of § 571.015, and burglary, first degree in Count III, a violation of § 569.160. A jury found him guilty on all three counts and assessed his punishment at 5 years on each count. The court sentenced him in accordance with the jury verdicts and ordered each sentence to be served consecutively. The Court of Appeals, Western District, affirmed his convictions for rape and burglary, first degree, reversed his conviction for armed criminal action, and transferred the case to this court. We have jurisdiction pursuant to Mo. Const. Art. V, § 10.

The Western District ordered the case transferred so that we might determine whether a remark by the prosecuting attorney during closing argument constituted a comment on the failure of the appellant to testify. We

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1. All citations are to RSMo. 1978 unless otherwise indicated.

consider the case now the same as on original appeal. We affirm appellant's convictions for rape and burglary, first degree, and reverse his conviction for armed criminal action.[2]

On January 22, 1979, at 9:30 p.m. and again, later, at 10:30 p.m., appellant knocked on the door of the manager of an apartment building in Kansas City, Missouri, and asked for a tenant by the name of John Bush. Bush had apparently lived in the building two years earlier, but the appellant was advised by the manager on both occasions that Bush no longer resided there.

At about 11:00 or 11:30 p.m. on the same evening, a 30 year old female tenant of a third floor apartment of this building answered a knock on her door. When she opened the door, she was confronted by appellant who asked her if she knew a man named Bush. After she told him she did not, appellant asked her if she was alone in the apartment. Even though she was by herself, she told him her husband was home but in bed. Appellant insisted that she wake him. Hearing the apartment manager outside and fearing for her safety, she started out her door. The appellant, however, pulled a knife, put his hand to her neck and pushed her back into the apartment. Once inside, he pushed her onto a bed and raped her.

After the attack, the victim left the apartment and went to her neighbor's apartment. There, she related the details of the rape. The police were summoned and appellant was apprehended trying to leave the apartment complex. While she was in her neighbor's apartment, the apartment manager noticed red marks on the victim's neck.

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2. We have drawn freely from the opinion of Manford, P.J.

The defense was consent. While appellant did not testify, he called three witnesses. The first was the medical examiner who had examined the victim at the hospital. He testified he conducted a pelvic examination of the victim and found motile semen in the victim's vagina. He also testified no red marks were apparent on the victim's neck and there was no other evidence of physical injury to the victim. The second witness was a friend of appellant who testified that at his request, she secured several items from his apartment, including luggage, sheets, and pillowcases. The victim identified these items as coming from her apartment and they were introduced into evidence. The third witness for appellant was an investigator for the public defender who testified as to the chain of custody surrounding this property. The victim testified that she had not given these items to the appellant and he had not taken them while in her presence. She further noted that he had not had time to steal them at the time of the rape. She testified that several weeks prior to the instant events, however, burglaries had occurred in and near the apartment complex. At that time, she had notified her landlord that several items were missing from her apartment. The landlord noted the burglaries and notified law enforcement authorities.

In addition, the victim and others were thoroughly cross-examined by defense counsel in an attempt to gain an admission that the victim knew appellant and had been with him on prior occasions. All of the state's witnesses, including the victim, disclaimed knowing or having ever seen appellant prior to the instant events.

In his first and second points on appeal, appellant asserts trial court error in convicting and sentencing him for both rape and armed criminal action. In light of previous decisions of this Court, we agree with the Western

District that appellant's conviction for armed criminal action constituted double jeopardy and should be reversed. *See*, State v. Haggard, 619 S.W.2d 44 (Mo. banc 1981); State v. Morgan, 592 S.W.2d 796 (Mo. banc 1980), *vacated* 449 U.S. 809 (1980), *on remand* 612 S.W.2d 1 (Mo. banc 1981); State v. Olds, 603 S.W.2d 501 (Mo. banc 1980).

In appellant's third point, he alleges error because of three remarks made by the prosecuting attorney during closing argument. Appellant promptly objected to the first two remarks and made a motion for a mistrial, both of which are overruled by the trial court. He did not object to the third remark, consequently, it must be reviewed under the plain error doctrine. We shall treat each of the three challenged remarks separately.

Appellant first contends that the prosecutor's statement, "Nobody told you it didn't happen,"[3] constituted

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3. Now, I am going to talk about the elements you have to find in connection with the witnesses or the evidence that you heard, what they told you. "Count No. I, if you "find and believe from the evidence beyond a reasonable doubt: One, that on or about January 22, 1979, in the County of Jackson, State of Missouri, the defendant was not married to Clara ....."

There is no evidence that all of those elements are not true. Clara ..... told you it was January 22, 1979. Everybody told you it was January 22, 1979.

"In the County of Jackson, State of Missouri," they all told you that that apartment building was located in Kansas City, Jackson County, Missouri—uncontroverted. "Clara ..... told you that she was not married to him (indicating) Charles Arnold. There is no evidence that she was—uncontroverted.

"Second, that at that time and place the defendant had sexual intercourse with Clara ....." Clara ..... told you. She told you it happened. *Nobody told you it didn't happen.*

MR. BROWN: Your Honor, may we approach the bench.

(Counsel approached the bench and the following proceedings were had:)

(Continued on following page)

a direct reference to his failure to testify and constituted a misstatement of the burden of proof. His argument under this point abandons the latter contention.

Unquestionably, a prosecutor is prohibited from adversely commenting on an accused's failure to testify. State v. Hutchinson, 458 S.W.2d 553 (Mo.banc 1970). The Missouri Constitution provides that "no person shall be compelled to testify against himself in a criminal cause . . . ." Mo. Const. Art. I, § 19. It is also provided by § 546.270 and Rule 27.05 (a) that:

> If the accused shall not avail himself or herself of his or her right to testify, . . . it shall not be construed to affect the innocence or guilt of the accused, nor shall the same raise any presumption of guilt, *nor be referred to by any attorney in the case,* nor be considered by the court or jury before whom the trial takes place. (emphasis added).

Footnote continued—

MR. BROWN: Your Honor, I would object to counsel's remarks regarding "nobody told you," the jury that there was no consent. State has a burden to prove that it was without consent. The defendant has no burden of proof in this case until it brings forth any evidence. I think that's a prejudicial remark on the burden of proof, and I would ask that you declare a mistrial at this point, because defendant is not held to produce any evidence or to controvert the lack of consent.

THE COURT: You can argue your side of the case for the defense, but all the counsel has said is that there is nothing to the contrary. He says the State has proved that there is nothing to the contrary. There has been no comment on the failure to testify, and I hope that there will not be by either of the counsel. I see nothing wrong. The objection is overruled, and the motion is overruled.

(The proceedings returned to open court.)

MR. GNEFKOW: And "Third, that the defendant did so without her consent by the use of forcible compulsion." Clara _____ told you that she did not consent, period. That's the evidence. She told you that. (emphasis added).

Appellant cites State v. Frankoviglia, 514 S.W.2d 536 (Mo. 1974) in support of his contention that this was a direct reference to appellant's failure to testify. Where there is a direct and certain reference to failure of the accused to testify, that constitutes reversible error. State v. Rothaus, 530 S.W.2d 235, 237 (Mo.banc 1975). In *Frankoviglia*, this court held: "The key words of the rule and statute are 'accused' and 'testify' . . . ." at 541. Crucial to the determination of whether the state has made a direct and certain reference to the accused's failure to testify is the use of these words or their equivalent.[4] State v. Cockrum, 592 S.W.2d 300, 302 (Mo.App. 1979). No such words were used here.

Appellant argues that even if it is not a direct reference to the failure of the accused to testify, it is an indirect reference, citing Eichelberger v. State, 524 S.W.2d 890 (Mo.App. 1975). The court must review the statement in the context it was made and determine whether it "highlighted" or was "reasonably apt to have directed the jury's attention to the fact he did not testify." *Eichelberger* at 894. If under the circumstances of the case, only the accused could deny the evidence on a vital portion of the case, the general statement that such proof was undisputed or undenied has been held to be an indirect reference to the accused's failure to testify. *See*, State v. Robinson, 184 S.W.2d 1017 (Mo. 1945); State v. Shuls, 44 S.W.2d 94 (Mo. 1931); State v. Snyder, 82 S.W. 12 (Mo. 1904).

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4. For example, in State v. Reed, 583 S.W.2d 531, 533 (Mo. App. 1979), the court held that the comment, "There is not a single witness who took the stand who is on trial. Bryan Reed is on trial," constituted a direct comment on the accused's failure to testify. Similarly, in State v. Linder, 282 S.W.2d 547, 550 (Mo. 1955), the prosecutor's statement, "I don't know what this boy [defendant] says. There is no evidence of any type by him in this case" constituted a direct reference to the accused's failure to testify.

Implicit in these cases is that the evidence referred to must be vital to the state's case and damaging to the accused. If it is not, a jury would not expect contrary testimony by the accused. His failure to testify is then neither *highlighted* nor the jury's attention *directed* to it.

Here, the prosecutor stated: "[T]he defendant had sexual intercourse with Clara ..... Clara told you .... Nobody told you it didn't happen." The testimony to which the prosecutor referred was vital to the state's case, but it was not damaging to appellant because his defense was consent.

The issue of consent permeated the entire trial. Defense counsel introduced evidence of personal articles belonging to the victim. The inference counsel tried to create was that the appellant received the items as gifts and therefore the victim and the appellant knew each other. The defense counsel vigorously cross-examined the victim and the other state's witnesses as to their previous knowledge of the appellant. It was a witness for appellant that provided the medical evidence the victim had sexual intercourse that evening. In closing argument to the jury, defense counsel stated:

> Now, Instruction No. Five tells you—Mr. Gnefkow has already gone over the basic elements—the one element that I want to focus on at this time and the third element, "That the defendant did so without her consent by the use of forcible compulsion."
>
> *Consent*, that is what we are basing our defense on, and that is consent. (emphasis added).

Our research has revealed no Missouri case which has reached this precise point but has discovered a Texas case we find instructive. In Scobey v. State, 169 S.W.2d 185, 189 (Tex. Crim. 1943), the prosecuting attorney stated

in his closing argument to the jury, "It seems to me that the issue is uncontradicted that Mr. Howell was robbed . . . ." The Court of Appeals, answering the appellant's contention that such remark was a reference to his failure to testify, or to contradict testimony which he alone could deny, stated:

> There was no issue as to whether Howell was robbed. The sole question was: Did appellant do it?
>
> The language used by State's counsel did not—directly or by inference—call upon appellant to answer that question before the jury. The argument was not, therefore, a reference to his failure to testify.

Similarly, here, the issue in this case was not whether the victim and the appellant had sexual intercourse, but whether there was consent. The prosecuting attorney's reference to evidence of the former did not in this case call upon the appellant to refute it.

The defense attorney inaccurately argued to the trial court that the prosecutor's statement went to the issue of consent. "I would object to counsel's remarks regarding nobody told you that there was no consent." The prosecutor, however, had not mentioned consent. That was not mentioned until later, "[a]nd Third, that the defendant did so without her consent . . . ."

Under the circumstances of this case, the prosecutor's remark no more *highlighted* or *directed* the jury's attention to the fact that appellant did not testify than did the prosecutor's earlier references to the "uncontroverted" facts that the appellant and the victim were not married, and these events took place on January 28, 1979, in Jackson County, Missouri. There is no merit to appellant's point.

The second remark by the prosecuting attorney challenged by appellant is contained in the following colloquy:

> Mr. Brown asks all of the State's witnesses—I asked all of the State's witnesses, have they ever seen Charles Arnold and Clara ..... together? There was no evidence that anybody ever saw them together.
>
> MR. BROWN: Your Honor, I will again object to that in the same—
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> (Counsel approached the bench.)
>
> MR. BROWN: I will renew my objection in that the defendant has no burden of proof in this case, and that counsel's remark on, there is no evidence that anybody saw her with him, is objectionable, and this is prejudicial, and I ask for a mistrial again for the same reason that I stated earlier.
>
> . . . .
>
> THE COURT: The objection is overruled and the motion is overruled.

Appellant asserts that this is an improper attempt to misstate the burden of proof. Appellant does not now contend that this is an indirect comment on defendant's right not to testify, as he alleged in his motion for new trial and is consequently considered abandoned on appeal. State v. Perkins, 543 S.W.2d 805, 807 (Mo.App. 1976).

Appellant apparently argues that since MAI-CR2d 2.20 establishes that the state has the burden of proof, any attempt to shift that burden in closing argument is error. The challenged statement by the prosecuting attorney was a comment upon the evidence and did not constitute an improper attempt to shift the burden of proof to the defendant. The victim was extensively cross-examined as

to whether she knew the appellant. In addition, one of her friends testified that she had never seen the victim and the appellant together. The defense was predicated on the victim and the appellant being friends, but yet there was no testimony that they were. Counsel is permitted to argue matters directly in evidence and to draw proper inferences therefrom. State v. Briggs, 579 S.W.2d 819, 821 (Mo.App. 1979).

The third challenged remark occurred in the second half of the prosecutor's closing argument:

> Occasionally, sometimes, a jury will say, "We know he did it, but you didn't prove it." Ladies and gentlemen, when you came into this courtroom during voir dire, I gave you a brief outline of what the case was about. And none of you knew anything about, and I submit to you ladies and gentlemen, if now you know he did it. I have proved it to you beyond a reasonable doubt. Thank you very much.

Appellant argues this constituted a definition of reasonable doubt. There was no objection to this portion of the prosecutor's argument, and hence appellant urges we review it as plain error. This requires error affecting substantial rights which results in manifest injustice or a miscarriage of justice. Rule 29.12 (b). Appellant's point is controlled by State v. Burnfin, 606 S.W.2d 629, 631 (Mo. 1980). In *Burnfin*, this court held a statement similar to this made by the prosecuting attorney in closing argument, and reviewed under the plain error doctrine, did not constitute a miscarriage of justice or result in manifest injustice. Appellant's point is without merit.

In his final point, appellant alleges the court erred in overruling his motion for acquittal on the charge of

burglary, first degree, because of the insufficiency of the evidence. We do not agree.

Appellant was charged with burglary, first degree, a violation of § 569.160.1 by unlawfully entering an inhabitable structure for the purpose of committing rape and while within that structure causing immediate physical injury to a person who was not a participant in the crime. Appellant contends there was insufficient evidence to establish that he caused immediate physical injury to the victim.[5] We disagree.

The victim testified that appellant squeezed her neck with his hand after entering the apartment. The manager of the apartment building testified that immediately after the rape, the victim "had red marks all around her neck." The doctor who examined her at an unstated later hour found no marks nor other evidence of physical injury.

Appellant appears to argue that § 569.160.1 requires an injury of a permanent type. This court cannot find within that section such a requirement. In the verdict directing instruction, physical injury was defined as "physical pain, illness or impairment of physical condition."

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5. The statute provides:

A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon; or

(2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or

(3) There is present in the structure another person who is not a participant in the crime.

Appellant could have been convicted of first degree burglary under any one of these three subsections. The state chose to charge him under subsection (2).

We think the evidence established the appellant caused the victim pain.

Webster's Third New International Dictionary defines pain as "a sensation which injures the skin;" or "a state of physical uneasiness ranging from mild discomfort . . . to . . . agony." The fact that the red marks did not appear or were not observed by the examining physician some time after the rape does not directly rebut the evidence that such marks appeared and were observed by another witness immediately after the attack. Appellant was entitled to rebut this evidence in the manner he chose. Conflicts in the evidence and the determination of the credibility of the witnesses are within the province of the jury. State v. Edwards, 574 S.W.2d 956, 957 (Mo. App. 1978).

We think a jury could infer from the testimony that appellant squeezed the victim's neck severely enough to cause her at least mild discomfort. The evidence was sufficient to support the finding by the trier of fact that appellant caused the victim physical injury. There is no merit to appellant's point and it is ruled against him.

Affirmed as to Count I and III; Reversed as to Count II.

James R. Reinhard, Special Judge

Welliver, P.J. Higgins
and Seiler, JJ. and
Roper, Sp.J. concur.

APPENDIX C-2

OPINION FILED March 30, 1981

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

No. WD 31326

STATE OF MISSOURI,
Respondent,

vs.

CHARLES ARNOLD,
Appellant.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY
HONORABLE JAMES A. MOORE, JUDGE

Before Manford, P.J., Dixon and Nugent, JJ.

This is a direct appeal from a jury conviction for rape, armed criminal action and burglary first degree. The judgment is affirmed in part and reversed in part.

Appellant presents four points of error, which in summary allege the trial court erred (1) in overruling appellant's motion for acquittal because of the insufficiency of the evidence; (2) in sentencing appellant for both rape and armed criminal action because the trial court had no jurisdiction to sentence for both offenses under § 556.014 (1) and 556.046(1), RSMo 1978 in that rape was established by proof of less than all the facts required to establish armed criminal action, the one fact less being the absence of a weapon; (3) in failing to dismiss the count of armed criminal action because said count placed appellant in double jeopardy and (4) in overruling appellant's motions for mistrial because of the closing argument

by respondent which amounted to direct reference to appellant's failure to testify, and such comments were a misstatement of the burden of proof and a definition of reasonable doubt.

On January 22, 1979, at approximately 9:00 or 9:30 p.m., appellant knocked on the door of the manager of an apartment complex at 17 East 34th Street, Kansas City, Missouri and asked for a tenant by the name of John Bush. He was advised that Bush no longer lived in the building. At about 10:30 p.m., appellant returned to the manager's door and again asked for a tenant named Bush. The manager told appellant that she did not know anyone named Bush and that such a person did not live in the building.

At about 11:00 or 11:30 p.m. on the same evening, a 30-year-old female tenant of this apartment complex, whose apartment was on the third floor, heard a knock on her apartment door. She answered the door, only to find appellant who asked her if she knew a man named Bush. She stated she did not know Bush, whereupon appellant asked her if she was alone in the apartment. She replied "no", and appellant insisted that she wake her husband. (The victim was alone, but told appellant that her husband was home and she would not wake him.) At this moment, she heard her landlady and started to walk out of her apartment door to holler at the landlady. At this point, appellant put a knife to her neck and pushed her back into the apartment. While he was pushing her, he placed the knife in his pocket. He pushed her onto a bed, opened her housecoat and raped her. She later testified that as appellant pushed her into the apartment, he put his hand on her neck. Other testimony indicated that she had red marks on her neck while at a friend's apartment (after the alleged rape), but medical testimony

for appellant indicated no red marks when she was later examined at a local hospital.

During the course of the attack, appellant heard a knock at the door, jumped up and got behind the door. The victim answered the door. At the door was another tenant who had come to warn the victim that there was a possible prowler in the building. The victim left her apartment with her neighbor and they went to the neighbor's apartment. There, the victim related the details of the rape by appellant. The police were summoned and appellant was apprehended trying to leave the apartment complex.

While appellant did not testify, he called three witnesses. The first was the medical examiner, who had examined the victim at the hospital. This witness testified that he conducted a pelvic exam of the victim and found semen in the victim's vagina. He testified that he found no other physical injuries to the victim. The second witness was appellant's friend who testified that at appellant's request she secured several items from appellant's apartment. These items were identified as the victim's property and were introduced into evidence. The third witness for appellant was an investigator for the public defender who testified as to the chain of evidence surrounding the victim's property.

Several weeks prior to the instant events, burglaries had occurred in and near the apartment complex. During this time, the victim had notified her landlord that several items were missing from her apartment, the landlord noted the burglaries and notified law enforcement authorities. In addition, the victim and others were thoroughly cross-examined in an attempt to gain an admission that the victim knew appellant and had been with him on prior occasions. All of the state's witnesses, including

the victim, disclaimed knowing or having ever seen appellant prior to the instant events. The victim admitted that appellant had not stolen the linen and other items while in her presence, and noted that he did not have time to steal them at the time of the rape. Apparently, the defense was to establish that the victim knew appellant, consorted with him and had given him the personal property later retrieved from his apartment.

The jury, after due deliberation, returned its verdict on all counts and the court assessed punishment at 5 years on each count, said sentences to be served consecutively.

In his point (1), appellant attacks the sufficiency of the evidence to support a finding of burglary, first degree. Appellant argues that the evidence was insufficient to support a finding that appellant caused immediate physical injury to the victim. The information charged appellant with burglary first degree by knowingly and unlawfully entering the inhabitable structure of the victim for the purpose of committing rape and while within the structure, causing immediate physical injury to the victim. The verdict-directing instruction (No. 8) required the jury to find as a fact (before it could convict for burglary first degree) that appellant caused immediate physical injury to the victim.

Burglary, first degree, is set forth in §569.160, RSMo 1978 and reads as follows:

> "*569.160. Burglary in the first degree.* 1. A person commits the crime of burglary in the first degree if he knowingly enters unlawfully or knowingly remains unlawfully in a building or inhabitable structure for the purpose of committing a crime therein, and when in effecting entry or while in the building or inhabitable structure or in immediate flight therefrom, he or another participant in the crime:

(1) Is armed with explosives or a deadly weapon or;

(2) Causes or threatens immediate physical injury to any person who is not a participant in the crime; or

(3) There is present in the structure another person who is not a participant in the crime.

2. Burglary in the first degree is a class B felony."

Appellant centers his argument around §569.160.1(2), alleging that since the examining physician found no physical injury to the victim, the evidence was rendered insufficient to support a conviction for burglary first degree.

The other subparagraphs of §569.160 aside (and it should be noted that the elements listed under this section are not conjunctive but are distinct elements, each of which support a burglary first conviction and which could support a finding of burglary first degree against appellant in the instant case), appellant elects to overlook positive direct testimony of not only the victim, but of other witnesses for the prosecution which established that the victim had red marks on her neck immediately after being raped.

From the record, it is obvious that the jury, as the trier of fact, simply elected to believe the victim and other witnesses that appellant had placed his hand on the victim's neck producing red marks on her neck. This was contrasted with the testimony of the examining physician, who viewed the victim at the hospital in the early morning hours following the rape. The record does not disclose the exact lapse of time between the rape, the placing of appellant's hand on the victim's neck and the physical examination.

Appellant appears to argue that §569.160.1(2) requires an injury of a permanent type. This court cannot find within that section such a requisite of permanent physical injury. The evidence surrounding the existence of red marks upon the victim's neck was in fact uncontroverted. The fact that the marks did not appear or were not observed by the examining physician some time after the rape does not directly rebut the evidence that such marks appeared and were observed by the victim and another witness immediately after the attack. Appellant was entitled to rebut this evidence in the manner he chose. The triers of fact were entitled to view this evidence in the manner they chose. The evidence was sufficient to support the finding by the trier of fact that appellant placed his hand upon the neck of the victim and thereby caused physical injury. There is no merit in appellant's point (1) and it is ruled against him.

Appellant's point (2) charges that the trial court lacked jurisdiction to sentence appellant for both rape and armed criminal action pursuant to §556.014(1) and §556.046 (1) because the rape was established by proof of less than all the facts required to establish armed criminal action, save one fact less, that being the absence of a weapon. This allegation is totally without merit. Appellant's argument challenges the intent of the legislature concerning multiple punishment for underlying felonies and armed criminal action. Appellant's contention has been addressed in the cases of Sours v. State, 593 S.W.2d 208 (Mo. banc 1980) (Sours I), and Sours v. State, 603 S.W.2d 592 (Mo.banc 1980) (Sours II). For a recent pronouncement on this precise point, see State v. Upshaw, ... S.W.2d ..... (Mo.App. 1981) (#WD 31443, March 30, 1981). Since there is a direct disposition of this issue by our state Supreme Court, (in the *Sours* decisions) it serves no purpose to discuss this issue in further detail,

nor does it serve appellant's purpose or others to persist in raising this point. Point (2) is found to be without merit and is ruled against appellant.

Point (3) is appellant's contention that the trial court's failure to dismiss the armed criminal action placed appellant in double jeopardy. Appellant's point (3) must be sustained because of our state Supreme Court's decisions in *Sours* I and II. That *Sours* I and II applies to any underlying felony and not just armed robbery, see State v. Greer, 609 S.W.2d 423 (Mo.App. 1980). Further, that the case of Brintley v. Michigan, 444 U.S. 948 (1978) does not control as argued by respondent, see State v. Upshaw, *supra*. Under *Sours* I and II, point (3) is sustained to appellant's favor. The conviction and sentence for armed criminal action is hereby set aside.

Appellant's final point (4) is in three parts. Appellant contends that the trial court erred in refusing to grant a mistrial because of remarks made by the prosecutor in closing argument. Appellant argues that the remarks (a) amounted to a definition of reasonable doubt; (b) were misstatements of the burden of proof and (c) amounted to a direct reference to appellant's failure to testify.

The comments by counsel for the state are referenced in particular as follows:

> "Second, that at that time and place the defendant had sexual intercourse with C..... S....." C..... S..... told you. She told you it happened. Nobody told you it didn't happen."

After these comments, a discussion took place between counsel and the court at the bench:

> "MR. BROWN: Your Honor, may we approach the bench.

(Counsel approached the bench and the following proceedings were had:)

MR. BROWN: Your Honor, I would object to counsel's remarks regarding 'nobody told you,' the jury that there was no consent. State has a burden to prove that it was without consent. The defendant has no burden of proof in this case until it brings forth any evidence. I think that's a prejudicial remark on the burden of proof, and I would ask that you declare a mistrial at this point, because defendant is not held to produce any evidence or to controvert the lack of consent.

THE COURT: You can argue your side of the case for the defense, but all the counsel has said is that there is nothing to the contrary. He says the State has proved that there is nothing to the contrary. There has been no comment on the failure to testify, and I hope that there will not be by either of the counsel. I see nothing wrong. The objection is overruled, and the motion is overruled."

Also, the record then revealed the following remarks and discussion between counsel and the court:

"MR. GNEFKOW: The bookstore—what did she tell you. I went to the bookstore to take the dinner to Marisa Brown's husband. I wasn't interested in what was in the bookstore. That is logical, ladies and gentlemen, that makes sense. Use your common sense. She was doing a friend a favor. She didn't go to the bookstore for an illicit relationship or to meet anybody. Mr. Brown asks of all the State's witnesses—I asked all of the State's witnesses, have they ever seen Charles Arnold and C.....S..... together? There was no evidence that anybody ever saw them together.

MR. BROWN: Your Honor, I will again object to that in the same—

(Counsel approached the bench.)

MR. BROWN: I will renew my objection in that the defendant has no burden of proof in this case, and that counsel's remark on, there is no evidence that anybody saw her with him, is objectionable, and this is prejudicial, and I ask for a mistrial again for the same reason that I stated earlier.

THE COURT: You are awfully sensitive to think that it was error that will call for a mistrial. I don't see any error. What did you do, Mr. Gnefkow?

MR. GNEFKOW: Your Honor, I am just commenting on the facts that everybody was asked whether they had seen them together, and the answer was no. I am bringing home the point that questions don't mean anything, only the answers.

THE COURT: The objection is overruled and the motion is overruled.

MR. BROWN: May I add to my comment. Counsel can couch his argument in terms of what the witnesses said, but this refers to no evidence, I still think implies that the defendant has to presume evidence in that case.

THE COURT: Nobody is arguing that the State doesn't have that burden or (sic) proof, but the argument is a legitimate argument."

Finally, the record reveals:

"Occasionally, sometimes, a jury will say, 'We know he did it, but you didn't prove it.' Ladies and gentlemen, when you came into this courtroom during voir dire, I gave you a brief outline of what the

case was about. And none of you knew anything about it, and I submit to you ladies and gentlemen, if now you know he did it. I have proved it to you beyond a reasonable doubt. Thank you very much."

It must be noted that there is no objection to this last portion of the state's argument, and review is urged under the plain error rule. Appellant, under (a) above, argues that it was "plain error" for the trial court to have permitted the prosecutor to state, ". . . and I submit to you ladies and gentlemen, if now you know he did it. I have proved it to you beyond a reasonable doubt." Appellant contends that this statement was tantamount to a definition of reasonable doubt. He appears to argue that the prosecutor attempted to redefine reasonable doubt by his (the prosecutor's) statement, "if now you know he did it. I have proved it to you beyond a reasonable doubt." In support of his argument, appellant cites State v. Belleville, 530 S.W.2d 392 (Mo.App. 1975) and State v. Henderson, 547 S.W.2d 141 (Mo.App. 1976). Neither of these authorities controls herein. *Belleville* was a case where the prosecutor commenced to discuss reasonable doubt by declaring to the jury, "At this time it can be explained to you as a jury what reasonable doubt is. Reasonable doubt is defined by the law in the State of Missouri . . ." *Belleville* at 394. This statement was objected to as an improper argument. The objection was overruled. The prosecutor's continued remarks that reasonable doubt was not merely the possibility of innocence but that of substantial doubt as to guilt was held on review to be improper. In *Henderson, supra*, reference by the prosecution that reasonable doubt does not mean "beyond a shadow" or "beyond any doubt" was not held improper. *Belleville* and *Henderson* do not control because in the instant case, the prosecutor's remarks, when viewed in

the light of the entire argument of record, reflect no attempt to redefine or define the term reasonable doubt. The argument is the mere assertion by the prosecutor that he has proven appellant's guilt beyond reasonable doubt. Such is a proper and permissible argument. In order for this court to provide relief under the plain error rule (Rule 29.12[b]), there must be a showing of manifest injustice or a miscarriage of justice. This court finds neither and point 4(a) is ruled against appellant.

In his point 4(b), appellant argues that the prosecutor's comments were a misstatement of the burden of proof. The pertinent portion of the prosecutor's argument, which appellant attacks as a misstatement of the burden of proof, is as follows:

> ". . . Mr. Brown asks all of the State's witnesses—I asked all the state's witnesses, have they ever seen Charles Arnold and *C*..... *S*..... together? There was no evidence that anybody ever saw them together."

Appellant appears to argue that by the foregoing statement, the prosecution intimated to the jury that he (appellant) was required to produce evidence that he and the victim had been seen or had seen together and thereby misrepresented to the jury that the burden of proof was on him. The victim was artfully cross-examined regarding her having known appellant and having been with him on prior occasions. The victim, repeatedly and without contradiction, denied knowing appellant. In addition, another state's witness who knew the victim quite well and who spent a great deal of time with the victim, testified that she never had seen the victim with appellant. The foregoing statement by the prosecutor amounted to nothing more than a comment upon the evidence. In closing argument, counsel is permitted to argue matters directly in evi-

dence and to draw proper inferences therefrom, see State v. Briggs, 579 S.W.2d 819 (Mo.App. 1979) and State v. Treadway, 558 S.W.2d 646 (Mo. banc 1977), cert.denied 439 U.S. 838 (1978), overruled on other grounds in Sours v State, 593 S.W.2d 208, 210 (Mo.banc 1980). Point 4(b) is found to be without merit and is ruled against appellant.

It should be pointed out that in appellant's motion for new trial, parallel to the specific contentions considered under 4(a) and 4(b), were allegations that such statements were also indirect comments on appellant's right not to testify. On this appeal, under those particular points, however, those attending allegations are neither presented nor explained. They are considered abandoned on this appeal, see State v. Perkins, 543 S.W.2d 805 (Mo.App. 1976) and State v. Umfleet, 538 S.W.2d 55 (Mo.App. 1976).

As his final point of error, appellant argues that comments by the prosecutor in closing argument amounted to a direct reference to appellant's failure to testify (or 4[c] above). The pertinent language attacked is, ". . . She told you it happened. *Nobody told you it didn't happen.*"

In his motion for new trial, appellant coupled the above attack (failure to testify) with the allegation that the foregoing was also a misstatement of the burden of proof. On this appeal, this allegation is not advanced along with this particular point and is considered abandoned, see *Perkins* and *Umfleet, supra.* However, see 4(b) where this allegation is directly considered by this court under the point of alleged error.

Appellant argues that the proscecutor's comments amounted to a direct reference to appellant's failure to testify and cites as controlling, State v. Frankoviglia, 514 S.W.2d 536 (Mo. 1974). *Frankoviglia*, at 541, stands for a

restatement of the prohibitory rule that the words *accused* and *testify* be referenced, and addresses the issue of whether or not the jury's attention is directed to the accused's failure to testify. This court holds that the instant case does not violate the rule delineated in *Frankoviglia*.

The wording of the above comment fails to amount to a direct reference to the failure of appellant to testify and was not thereby violative of appellant's constitutional guarantee under the 5th Amendment to the United States Constitution; Mo.Const.Art. I, §19; Rule 27.05 and §546.270, RSMo 1978. See State v. Hutchinson, 458 S.W.2d 553 (Mo. banc 1970); State v. Pruitt, 479 S.W.2d 785 (Mo.banc 1972); State v. Rothaus, 530 S.W.2d 235 (Mo.banc 1975); State v. Williams, 597 S.W.2d 722 (Mo.App. 1980) and State v. Sechrest, 485 S.W.2d 96 (Mo. 1972).

Appellant is not content to only argue that the prosecutor's statements were a direct comment on his (appellant's) failure to testify, but offers an alternative argument that if those comments are not direct, then they are indirect and violate the rule of Eichelberger v. State, 524 S.W.2d 890 (Mo.App. 1975). To be sure, our courts have construed the constitutional and statutory prohibition against comment upon an accused's failure to testify in both a direct and an indirect context. State v. Shields, 391 S.W.2d 909 (Mo. 1965). The rule of indirect comment, however, contains certain requirements before it becomes applicable in any given case. As pointed out in *Eichelberger*, the test as to the applicability of the indirect reference prohibition is the determination of whether, under all the circumstances, such comments or references highlight the defendant's failure to testify. When that requirement is applied to the instant case, it cannot be held that the statement "highlighted" appellant's failure to testify.

Appellant called three witnesses to the stand. The prosecution is entitled to comment upon the weakness of the defense evidence. The statement herein does not reference appellant or his failure to testify, but merely refers to the quality of the defense evidence. Such comments are permissible, see State v. Hayzlett, 265 S.W.2d 321 (Mo. 1954).

In addition to the failure of the foregoing comment to amount to a direct or an indirect comment on appellant's failure to testify, any error would have been rendered harmless by the jury's having been instructed as follows:

"INSTRUCTION NO. 11

Under the law, a defendant has the right not to testify. No presumption of guilt may be raised and no inference of any kind may be drawn from the fact that the defendant did not testify. (MAI-CR2d 3.76 Defendant)"

See State v. Bronaugh, 571 S.W.2d 788 (Mo.App. 1978).

This court concludes that the comments by the prosecutor herein did not amount to a direct or indirect comment or reference to appellant's failure to testify. See *Hutchinson, Pruitt, Rothaus, Sechrest* and *Williams, supra.* It is further held that the comment herein was a comment upon the quality of the evidence permitted under *Hayzlett, supra.* Further, under *Bronaugh, supra,* the submission of MAI-CR2d 3.76 would render such comment harmless error.

Point 4(c) is found to be without merit and is ruled against appellant.

For the reasons set forth herein, that portion of the judgment related to the conviction and sentencing for the offense of armed criminal action is set aside and declared

void. That portion of the judgment related to the conviction and sentencing for the offenses of rape and burglary first degree is in all respects affirmed.

Donald L. Manford, P.J.

Nugent, J. concurs; Dixon, J., dissents in separate dissenting opinion.

Opinion Filed: March 30, 1981

MISSOURI COURT OF APPEALS
WESTERN DISTRICT
No. WD31326

STATE OF MISSOURI,
Respondent,

vs.

CHARLES ARNOLD,
Appellant.

DISSENTING OPINION

I respectfully dissent. I believe the comment in this case, "Nobody told you it didn't happen," is an even more pointed reference than that used in State v. Zagorski, No. WD31363, [February 2, 1981]. For the reasons stated in *Zagorski*, I would reverse and remand.

The issue posed in this case will undoubtedly be resolved by the decision of the Supreme Court in State v. Zagorski, *supra*, which has already been transferred. I believe this case should likewise be transferred to the Supreme Court.

David J. Dixon, Judge

APPENDIX D

Section 556.041, RSMo 1978, reads as follows:

"**556.041. Limitation on conviction for multiple offenses.**—When the same conduct of a person may establist the commission of more than one offense he may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if

(1) One offense is included in the other, as defined in section 556.046; or

(2) Inconsistent findings of fact are required to establish the commission of the offenses; or

(3) The offenses differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct; or

(4) The offense is defined as a continuing course of conduct and the person's course of conduct was uninterrupted, unless the law provides that specific periods of such conduct constitute separate offenses."

Section 566.030, RSMo 1978, reads as follows:

"**566.030. Rape.**—1. A person commits the crime of rape if:

(1) He has sexual intercourse with another person to whom he is not married, without that person's consent by the use of forcible compulsion; or

(2) He has sexual intercourse with another person to whom he is not married who is less than fourteen years old.

2. Rape is a class B felony unless in the course thereof the actor inflicts serious physical injury on

any person or displays a deadly weapon in a threatening manner, in which cases rape is a class A felony." Section 569.030, RSMo 1978, reads as follows:

"569.030. **Robbery in the second degree.**—1. A person commits the crime of robbery in the second degree when he forcibly steals property.

2. Robbery in the second degree is a class B felony."

Section 571.015, RSMo 1978 (effective Jan. 1, 1979), reads as follows:

"571.015. **Armed criminal action, defined, penalty.**—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime com-

mittee by, with, or through the use, assistance, or aid of dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar years.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

Section 559.225, RSMo Supp. 1976 (repealed, Jan. 1, 1979), reads as follows:

"**559.225. Armed criminal action—penalty—exceptions.**—1. Except as provided in subsection 4 of this section, any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous or deadly weapon is also guilty of the crime of armed criminal action and, upon conviction, shall be punished by imprisonment by the division of corrections for a term of not less than three years. The punishment imposed pursuant to this subsection shall be in addition to any

punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of three calendar years.

2. Any person convicted of a second offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than five years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of five calendar year.

3. Any person convicted of a third or subsequent offense of armed criminal action shall be punished by imprisonment by the division of corrections for a term of not less than ten years. The punishment imposed pursuant to this subsection shall be in addition to any punishment provided by law for the crime committed by, with, or through the use, assistance, or aid of a dangerous or deadly weapon. No person convicted under this subsection shall be eligible for parole, probation, conditional release or suspended imposition or execution of sentence for a period of ten calendar years.

4. The provisions of this section shall not apply to the felonies defined in sections 559.005, 564.590, 564.610, 564.620, 564.630, and 564.640, RSMo."

APPENDIX E

Section 750.227(b), M.C.L.A., reads as follows:

"Michigan Compiled Laws Annotated, 750.227b. *Possession at time of commission or attempted commission of felony; additional sentence, punishment—*

"Sec. 227b (1) A person who carries or has in his possession a firearm at the time he commits or attempts to commit a felony except the violation of section 227 or section 227a, is guilty of a felony, and shall be imprisoned for 2 years. Upon a second conviction under this section, the person shall be imprisoned for 5 years. Upon a third or subsequent conviction under this section, the person shall be imprisoned for 10 years.

"(2) The term of imprisonment prescribed by this section shall be in addition to the sentence imposed for the conviction of the felony or the attempt to commit the felony, and shall be served consecutively with and preceding any term of imprisonment imposed for the conviction of the felony or attempt to commit the felony.

"(3) The term of imprisonment imposed under this section shall not be suspended. The person subject to the sentence mandated by this section shall not be eligible for parole or probation during the mandatory term, imposed pursuant to subsection (1). P.A. 1931, No. 328, § 227b, added to P.A. 1976, No. 6, § 1, Eff. Jan. 1, 1977." [footnote omitted.]

Section 750.529, M.C.L.A., reads as follows:

"750.529. Armed robbery; aggravated assault—Any person who shall assault another, and shall feloni-

ously rob, steal and take from his person, or in his presence, any money or other property, which may be the subject of larceny, such robber being armed with a dangerous weapon, or any article used or fashioned in a manner to lead the person so assaulted to reasonably believe it to be a dangerous weapon, shall be guilty of a felony, punishable by imprisonment in the state prison for life or for any term of years. If an aggravated assault or serious injury is inflicted by any person while committing an armed robbery as defined in this section, the sentence shall be not less than 2 years' imprisonment in the state prison. As amended P.A. 1959, No. 71, § 1, Eff. March 19, 1960."